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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

ASHLEY CREEK PHOSPHATE CO.
&
STATE OF UTAH
Petitioners,

v.

CHEVRON USA, INC. et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TAB 3

ASHLEY CREEK PHOSPHATE CO.
a Utah Corporation, Plaintiff,

v.

CHEVRON et al., Defendants.

No. 2:89CV554.

United States District Court,
D. Utah,
Central Division.

July 14, 2000.

Mineral lessee sued pipeline owner, alleging that tariff rate was exclusionary under essential facilities doctrine. On owner's motion for summary judgment, the District Court, Kimball, J., held that: (1) lessee lacked standing to assert antitrust claim, and (2) Federal Land Policy and Management Act (FLPMA) does not provide for private cause of action.

1. **Federal Civil Procedure 103.2**
Standing to assert claim is question of law to be decided by the court.

2. **Monopolies 28(1.4, 1.6)**
To have standing to bring antitrust claim, plaintiff must have suffered antitrust injury and there must be direct causal connection between that injury and alleged violation of antitrust laws. Clayton Act, §4, 15 U.S.C.A. § 15.

3. **Monopolies 28(1.4)**

To have "antitrust injury," and hence standing, plaintiff not already in allegedly injured market must have both manifested intention to enter market and demonstrated preparedness to do so. Clayton Act, §4, 15 U.S.C.A. § 15.

4. **Monopolies 28(1.6)**

Factors court considers in evaluating antitrust plaintiff's preparedness to enter allegedly injured market, and hence its standing to sue for alleged antitrust violation, are: (1) ability to finance, (2) consummation of contracts, (3) affirmative action to enter market, and (4) background and experience in particular business. Clayton Act, §4, 15 U.S.C.A. § 15.

5. **Monopolies 28(1.6)**

Mining interest lessee was not prepared to enter phosphate concentrate or phosphate fertilizer markets, and thus lacked standing to challenge pipeline owner's allegedly exclusionary tariff; lessee lacked financing, had not taken basic affirmative steps needed to enter relevant markets, and lacked background and experience necessary to enter them. Clayton Act, §4, 15 U.S.C.A. § 15.

6. **Monopolies 28(1.6)**

Mining interest lessee lacked standing to challenge pipeline owner's allegedly exclusionary tariff rate absent showing that tariff was preventing it from entering phosphate concentrate or phosphate fertilizer markets; lessee was unable to show that it could profitable sell concentrate or fertilizer at any tariff rate. Clayton Act, §4, 15 U.S.C.A. § 15.

7. Monopolies 28(1.6)

Mining interest lessee lacked standing to challenge pipeline owner's allegedly exclusionary tariff rate, even if rate reduced value of its mineral leases, absent evidence that lessee was prepared to enter mining business. Clayton Act, §4, 15 U.S.C.A. § 15.

8. Monopolies 28(1.2)

Private antitrust action cannot be maintained based upon lawful rate filed with Surface Transportation Board (STB). Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

9. Monopolies 17(2.2)

Pipeline owner's tariff rate was not exclusionary under essential facilities doctrine where, even including predecessor's rate overcharge prior to lessee's projected use of pipeline and most favorable scenario for mineral lessee's future utilization of pipeline, application of current tariff would result in net undercharge over life of pipeline. Sherman Act, §1, as amended, 15 U.S.C.A. § 1.

10. Action 3

Federal Land Policy and Management Act (FLPMA) does not provide for a private cause of action. Federal Land Policy and Management Act of 1976, § 102 et seq., 43 U.S.C.A. § 1701 et seq.

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Pendant state law claims should be dismissed if federal claims are dismissed before trial.

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Judith A. Albert, Thomas J. Stilling, Surface Transportation Board, Office Of The General Counsel, Washington, DC, for Surface Transportation Bd.

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Edmond S. Gross, Kansas City, MO, for Farmland Industries.

AMENDED MEMORANDUM DECISION AND ORDER

KIMBALL, District Judge.

This matter is before the court on Defendants Farmland Industries, Inc., J.R. Simplot Company, SF Phosphates Limited Company, SF Pipeline Limited Company, and FS, Inc.'s (collectively the "SF Defendants") Motion for Summary Judgment. A hearing on that motion was held on June 14, 2000. At the hearing, the SF Defendants were represented by Peter W. Billings and James S. Jardine. Plaintiff Ashley Creek Phosphate Company ("Ashley Creek") was represented by E. Craig Smay. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties, including the Surface Transportation Board Decision, No 40131 (Sub-No. 1), dated October 28, 1996 (the "STB Decision") and the Memorandum Decision Addressing SF Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, issued by Judge David Sam on June 19, 1998 ("Judge Sam's Decision"). Since taking the matter under advisement, the court has further considered the law and the facts relating to this motion. Now being fully advised, the court renders the following Amended Memorandum Decision and Order.

BACKGROUND

A. BACKGROUND REGARDING THE CASE

This suit pertains to Ashley Creek's efforts to use a pipeline to carry phosphate, used primarily in the manufacture of phosphate fertilizer, from fields in Vernal to a rail junction in Rock Springs (the "Pipeline"). The fields in Vernal are presently owned by the SF Defendants-who purchased the fields from Chevron in 1992-and the State of Utah. In 1974, Ashley Creek purchased the right to mine the State's holdings.

Ashley Creek maintains that the Pipeline is the only way to transport phosphate from Vernal to a plant because: (1) easements for another pipeline will not be issued by the federal government due to the environmental sensitivity of the land, and (2) the State of Utah will no longer issue overweight trucking permits for transportation by truck due to the damage such trucking causes (which is the factor that led Chevron to construct the Pipeline in the first place).

The Pipeline was owned and controlled by Chevron at the time it began operating in 1986. Chevron obtained the rights-of-way necessary to construct the Pipeline by assuring various federal agencies that it would operate the line as a common carrier. However, once the Pipeline was built, Chevron refused to publish a tariff until it was ordered to do so in 1989 by the Interstate Commerce Commission ("ICC"), which was acting in response to a complaint filed by Ashley Creek.

Ashley Creek responded to the tariff by filing this antitrust lawsuit, alleging, among other things, that the tariff is outrageous and violates the essential facilities doctrine of Sections 1 and 2 of the Sherman Act. The reasonableness of Chevron's rates was referred to the ICC by the district court. On April 17, 1992, while the ICC proceeding was still pending, Chevron sold its Vernal phosphate fields, its Rock Springs plant, and the Pipeline to entities formed by J.R. Simplot Company and Farmland Industries, Inc.-the "SF Defendants". The SF Defendants continued the tariff and were joined as defendants.

In 1996, the Surface Transportation Board, ("STB") (successor to the ICC) issued a ruling, finding that the tariff was unreasonable at many volumes. Specifically, the STB ruling sets forth a formula that enables the SF Defendants, as the owners of the Pipeline, to recover the cost of constructing ($35 million) and operating the Pipeline, plus a reasonable rate of return. The formula allows the SF Defendants to recover the construction costs on a flat rate per ton, as opposed to an accelerated rate of depreciation, as the SF Defendants advocated, or a flat rate per year as Ashley Creek advocated. For this reason, it is impossible to determine whether the tariff "over-recovers" until the total volume of phosphate shipped during the life of the Pipeline is known or assumed. Once the total volume is known or assumed, the depreciation per ton can be determined and a calculation made of a specific amount recovered for each month, depending on that month's known or assumed volume. The STB applied the formula to two different hypothetical sets of volumes and concluded that the tariff

over-recovered, that is, was unreasonable, at many volumes.

After the STB issued its decision, the SF Defendants moved to dismiss Ashley Creek's lawsuit on the grounds that, assuming Ashley Creek shipped its projected quantities, there would be no over-recovery during the 14-year period that the SF Defendants owned the Pipeline. Judge Sam denied the motion, primarily on the ground that a 20-year period must be utilized.

The SF Defendants then established a new tariff (effective January 1, 1999), which they claim results in a net under-collection of $3.3 to $5.4 million over the Pipeline's 20-year life. The SF Defendants claim that the new tariff provides only for recovery of operating and fixed costs and does not recover the $35 million construction costs.

B. BACKGROUND REGARDING THE PRESENT MOTION

The SF Defendants seek summary judgment on all of Ashley Creek's claims directed toward them.[1] First, they have moved for summary judgment on the Counts I through IX of the Second Amended Complaint (the antitrust claims) on two independent grounds. First, the SF Defendants claim that, as a matter of law, Ashley Creek does not have standing to bring antitrust claims for two reasons. The SF Defendants contend that Ashley Creek cannot show that it is prepared to enter any of the markets identified in the Second Amended Complaint. In

[1] The Chevron Defendants have not moved for summary judgment.

addition, the SF Defendants claim that Ashley Creek has admitted that the tariff in place during the SF Defendants' involvement with the Pipeline is not the reason for Ashley Creek's failure to develop its property. Thus, the SF Defendants argue that, as a matter of law, there is no causal nexus between the alleged violation and any alleged damage to business or property under the antitrust laws. As a second independent basis for summary judgment, the SF Defendants contend that the tariff charged by them is, as a matter of law, reasonable and cannot be the basis for exclusionary conduct.

The SF Defendants have also moved for summary judgment on Counts X and XII. Both of these claims are based on the SF Defendants' obligation under the Federal Land Policy and Management Act ("FLPMA"). According to the SF Defendants, the Tenth Circuit has recognized that no private cause of action exists under FLPMA for Ashley Creek, and there is no evidence that the tariff has affected any alleged easement by necessity in favor of Ashley Creek.

Finally, the SF Defendants have moved for summary judgment on Count XI, which is a state law nuisance claim. Because there is no diversity between Ashley Creek and the SF Defendants, and if the federal claims are dismissed, the SF Defendants claim that this state law claim should also be dismissed.

STANDARD OF REVIEW

A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate when the pleadings depositions, and affidavits on file show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The movant bears an initial burden to demonstrate an absence of evidence to support an essential element of the non-movant's case. If the movant carries this initial burden, the burden then shifts to the non-movant to make a showing sufficient to establish that there is a genuine issue of material fact regarding the existence of that element.[2] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). While the non-movant is entitled to the benefit of whatever reasonable inferences there are in its favor, the reasonableness of those inferences is scrutinized in light of the undisputed facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine dispute exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise

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[2] Ashley Creek did not refer the court to any material facts that it claims are in dispute; rather, it simply provided its own statement of undisputed facts, which does not comport with the requirement of DUCivR 56-1(b). Technically, under DUCivR 56-1(c), all of the SF Defendants' facts should be deemed admitted for purposes of summary judgment. However, the court in conducting its analysis, has made an attempt to evaluate whether Ashley Creek has created a genuine issue regarding any material facts.

properly supported motion for summary judgment; the requirement is that there is no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48, 106 S.Ct. 2505 (emphasis in original).

DISCUSSION

1. DOES ASHLEY CREEK HAVE STANDING TO BRING ANTITRUST CLAIMS?

Ashley Creek claims that the tariff on the Pipeline prevented Ashley Creek from entering both the market for phosphate concentrate and the market for phosphate fertilizer.[3] The SF Defendants claim that Ashley Creek does not have standing to bring such claims because Ashley Creek was not prepared to enter the relevant markets and because there is no causal nexus between the alleged antitrust violation and the alleged damage.

[1-3] The Tenth Circuit has repeatedly held that standing is a question of law to be decided by the court. *See, e.g., Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 338 (10th Cir.1982), *cert. denied*, 459 U.S. 1090, 103 S.Ct. 576, 74 L.Ed.2d 937 (1982); *Motive Parts Warehouse v. Facet Enter.*, 774 F.2d 380, 389 (10th Cir.1985). To have standing to bring such claims, Ashley

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[3] The SF Defendants point out that Ashley Creek also asserts a claim for antitrust violation in the "transportation of phosphate rock concentrate" market. The SF Defendants point out, and the court agrees, that there is absolutely no evidence that Ashley Creek was prepared to enter the phosphate fertilizer market or the transportation of phosphate market, assuming such a market exists. Thus, the bulk of the analysis pertains to the phosphate concentrate market.

Creek must satisfy a two-pronged test: it must have an antitrust injury, and there must be a direct and causal connection between that injury and the alleged violation of the antitrust laws. *See Sports Racing Serv. Inc. v. Sports Car Club of Amer., Inc.*, 131 F.3d 874, 882 (10th Cir.1997). Ashley Creek is not, and has never been, in the business of either (1) mining and selling phosphate concentrate or (2) manufacturing and selling phosphate fertilizer. Thus, to have an "antitrust injury," a plaintiff not already in the allegedly injured market must have both "manifested an intention to enter" *and* "demonstrated a preparedness to do so."[4] *See, e.g., Sports Racing Serv. Inc.*, 131 F.3d at 882; *Curtis*, 687 F.2d at 338.

[4] The Tenth Circuit, like other circuits, has identified four "key elements" in evaluating preparedness: (1) ability to finance, (2) consummation of contracts, (3) affirmative action to enter the market, and (4) background and experience in the particular business. *See Curtis*, 687 F.2d at 338; *Go-Video, Inc. v. Matsushita Elec. Indus. (In re Dual-Deck Video Cassette Recorder Antitrust Litigation)*, 11 F.3d 1460, 1465 (9th Cir.1993); *Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633-34 (5th Cir.1966), *cert. denied*, 385 U.S. 991, 87 S.Ct. 600, 17 L.Ed.2d 451 (1966). Courts have held that preparedness requires a showing of "concreteness" that demonstrates the ultimate success of the proposed business:

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[4] The court has assumed that Ashley Creek has manifested its intention to enter the relevant markets.

> Uniformly, the courts have drawn the line at the point where promotion transcends the level of hopes, desires, and expectations, and reaches a certain state of maturity and concreteness, a state where it is accompanied by certain indicia of ultimate success. Put another way, the courts have held that a potential competitor cannot achieve standing merely by demonstrating his intention to enter a field; he must also demonstrate his preparedness to do so.

Hecht v. Pro-Football, Inc., 570 F.2d 982, 994 (D.C.Cir.1997), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978).

1. Is Ashley Creek Prepared to Enter the Relevant Markets?

[5] The testimony of John Archer ("Archer"), Ashley Creek's president and principal shareholder, as well as its mining engineer, shows that Ashley Creek not only fails all four tests, but it has failed to determine whether there is a market for phosphate rock concentrate at the price that Ashley Creek would have to charge to cover its costs.

Specifically, Ashley Creek itself estimates that the cost to enter the phosphate concentrate market was in excess of $67 million in 1992, and the cost to enter the phosphate fertilizer market was an additional $187 million. Archer testified that Ashley Creek has only a thousand dollars to its name and has done nothing to obtain financing. To obtain the necessary financing, Archer testified that Ashley Creek has conducted only a "Type 1" study. Archer also admitted that to obtain financing, Ashley Creek would also need signed contracts

with customers to purchase Ashley Creek's products at a specified price, but that Ashley Creek has never discussed price with any potential customer, let alone obtained a signed contract specifying the price.

Even more fundamental than a lack of financing, Ashley Creek has not taken the basic affirmative steps toward entering such capital intensive markets. With respect to the phosphate fertilizer market, all Ashley Creek has done is *consider* constructing a fertilizer plant, which is not enough.[5] As for the phosphate concentrate market, Ashley Creek has had only a "Type 1" feasibility study done, which describes how Ashley Creek would mine, mill, and ship phosphate. According to David Aro ("Aro"), the consulting mining engineer who prepared the study in 1985, a Type 1 feasibility study is very preliminary and "is seldom adequate for positive acceptance of a project." Based on this study, Ashley Creek knows what its own costs would be only within a margin of plus or minus 25%. Ashley Creek does not know the cost to ship its concentrate from the end of the pipeline to its potential customers. Ashley Creek does not know whether there are any customers who would buy concentrate at the price Ashley Creek would have to charge even if the Pipeline tariff were zero.[6] While Ashley Creek claims that the tariff is too high, it does not know whether it could profitably ship at the actual tariff rates or indeed at *any* tariff rate.

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[5] Moreover, in 1987, Archer testified under oath in an ICC proceeding that Ashley Creek had no intention of entering the phosphate market.

[6] The SF Defendants contend that the experience of others actually in the market demonstrates that there is, in fact, no market for Vernal phosphate concentrate beyond what the currently operating fertilizer plant at Rock Springs can use.

Merely knowing that there are phosphate deposits on its leases is not sufficient to demonstrate that Ashley Creek is prepared to enter the market. *See Practice Perfect Inc. v. Hamilton County Pharm. Ass'n,* 732 F.Supp. 798, 803 (S.D.Ohio1989) (holding plaintiff's principals failed to identify a sufficient market for their services which was an essential element for the success of their proposed business); *Gas Utilities Co. of Ala., Inc. v. Southern Natural Gas Co.*, 825 F.Supp. 1551, 1572 (N.D.Ala.1992), *aff'd*, 996 F.2d 282 (11thCir.1993) (finding that plaintiff lacked preparedness to enter market because *inter alia* "[t]here [was] no evidence of a plan whereby plaintiff could successfully undercut [defendant's] prices and have the financial ability to repay loans."). Even Aro, Ashley Creek's consulting mining engineer who prepared the Type 1 feasibility study, wrote the following notes in October 1993:

> I have felt for some time that the level of *legal effort* far exceeds the level of *technical data* that is essential to verifying the reserves and costs.
> Without "proven" reserves and "acceptable" costs, the legal arguments could be "hypothetical and meaningless."
> At the present time –
> 1-No proven reserves, only prob. and prosp.
> 2-No detailed estimate of acceptable capital costs and operating costs
> 3-No definition of metallurgy needed for conceptual plant design
> Pipeline tariff-only ONE of many cost facts-If in range of $3.00 to $4.00, no problem-other technical data acquisition can proceed!!

Ex. 59 to the Memorandum in Support of the SF Defendants' Motion for Summary Judgment ("SF Defendants' Memo in Support")(emphasis in original". Aro's concerns were valid.

Finally, the SF Defendants argue that Ashley Creek does not have the background or experience to enter the market for the mining, milling, and sale of phosphate concentrate. The court agrees. Archer, Ashley Creek's only officer has never had any experience in mining, milling, or selling phosphate concentrate. The other officers, Aro and Craig Smay, have resigned. Whatever experience Archer may have had in buying and selling phosphate *reserves*, that is not experience in mining and selling phosphate concentrate.

Ashley Creek contents that it need not have completed any step that would have been rendered useless by Defendants. Ashley Creek cites several cases for this proposition. For example, in *Thompson v. Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991), the court stated that:

> [A] defendant cannot benefit by the application of the standing doctrine from the fact that it is able to prevent the plaintiff from becoming a consumer of its product. As long as the plaintiff made a reasonable attempt to enter the market, . . . the plaintiff has standing to contest antitrust violations which create barriers to that market.

Similarly, in *Fleer Corp. v. Topps Chewing Gum, Inc.*, 415 F.Supp. 176, 179 (E.D.Pa.1976), the court held:

> We cannot find that [plaintiff's] steps toward entry were insubstantial if it is true that the taking of any

> further steps would have been a sheer waste of resources. It would be inconsistent with one purpose of the Clayton Act-to protect the business interests of victims of monopolistic practices-to require an antitrust plaintiff to pay a courtroom entrance fee in the form of an expenditure of substantial resources in a clearly futile competitive gesture.

Ashley Creek claims that any further steps that it might have taken would have been futile.

Even assuming that is a correct statement of the law,[7] Ashley Creek does not meet the factual predicate. Ashley Creek claims that defendants withheld information that prevented Ashley Creek from obtaining financing. However, the only information that was allegedly withheld was *Chevron's* delay in publishing a tariff. That is the conduct of Chevron, not the SF Defendants. Moreover, Chevron remedied whatever harm it caused by publishing a tariff in 1989. Even after Archer knew what the tariff would be, he testified that he did nothing to determine whether it was economically feasible to sell under the new $4.60 tariff. The margin of error (+/$9.00) for Ashley Creek's costs is greater than the entire third tariff of $4.60, let alone the margin by which Ashley Creek claims the tariff is unreasonable. In sum,

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[7] The tenth Circuit has not addressed the question but the Fifth Circuit has held the opposite. In *Jayco Sys., Inc. v. Savin Bus. Mach. Corp.*, 777 F.2d 306, 314 (5th Cir. 1985), the court held that it was "not dispositive" that the defendant would not have dealt with plaintiff *even* if the plaintiff had satisfied the four elements regarding preparedness. "Rather the question is whether, assuming Savin had been willing to supply Jayco with the necessary machines, Jayco would have been prepared to bid them."

Ashley Creek does not know "whether it could profitably sell phosphate concentrate" at the third tariff rate.

Even assuming the rate was too high, the SF Defendants did not prevent Ashley Creek from determining (1) what price customers would pay; (2) the freight costs to ship from Rock Springs; or (3) its own costs with sufficient precision to know whether a few dollars difference in the tariff would make any difference. Ashley Creek admits that it "has never done any analysis to determine whether the tariffs have in fact prevented Ashley Creek from selling its product or developing its project." Thus, Ashley Creek has failed to create a genuine dispute regarding whether the tariffs prevented it from preparing to enter the market. Furthermore, Archer's testimony confirms that the tariffs had very little, if anything, to do with Ashley Creek's failure to enter the market. Archer has testified that he will not go forward without owning 40% of the Pipeline, thus precluding Ashley Creek's claim that the tariff is an excuse for not proceeding with preparations for its project. Since March 1997 there has been a settlement agreement (the "SITLA Agreement") between the State of Utah and SF Pipeline that guarantees that the tariff will not be raised. Since January 1999, the fourth tariff recovers only operating and new capital costs and no original capital costs. Despite guaranteed access and a tariff that will never exceed operating costs, Ashley Creek has still not prepared to enter the market.

Thus, the court finds that Ashley Creek was not and is not prepared to enter any of the relevant markets, and its antitrust claims are dismissed on that basis.

2. Is There a Nexus Between the Alleged Injury and Alleged Violation of Antitrust Laws?

[6] Ashley Creek cannot satisfy the second prong of the standing requirement because its own admissions make it impossible to show a causal nexus between the alleged violation (an unreasonable tariff) and the alleged injury (exclusion from the market). The same evidence discussed above demonstrates that there is no causal connection between the alleged violation and the alleged injury. First, Ashley Creek does not know (1) the amount by which the tariffs is unreasonable, (2) the price any customer would pay, (3) the freight from Rock Springs, or (4) at what tariff rate, if any, Ashley Creek could profitably ship and sell its concentrate. Moreover, Archer testified that whatever the tariff, he will not go forward with his project until he obtains an equity interest in the Pipeline. Thus, he has testified that the tariff did not make any difference.

Accordingly, the court finds that there is no causal nexus between the alleged violation and the alleged injury, and Ashley Creek's antitrust claims are dismissed on that basis.

C. Does Ashley Creek Have Standing Based on Alleged Injury to Its Leases.

[7] Ashley Creek argues that it has standing because this court has already determined that injury to Ashley Creek's property-its leases-confers standing without regard to injury to business. Section 4 of the Clayton Act provides standing to anyone "injured in their business or property by reason of anything forbidden in the antitrust laws." Ashley Creek argues that "Defendants' failure to provide plaintiff's leaseholds with the access to market to which they were statutorily entitled

decreased the value of the leaseholds, and that, as a result, plaintiff has standing to assert the injury to its property."

In Judge Sam's Decision, he did not rule that Ashley Creek has standing on this basis. In a previous motion to dismiss, the SF Defendants argued that Ashley Creek did not have standing to complain about a conspiracy to raise prices for phosphate concentrate since Ashley Creek was not intending to be a buyer but a seller of concentrate. The SF Defendants did not raise, and Judge Sam did not address, the issue of whether Ashley Creek was prepared to enter the market.

The court disagrees that Ashley Creek has standing solely by virtue of its mineral leases. The mineral leases (for which Archer or Ashley Creek now pays a little over $11,000 per year) is only one minor component in the development of a project that Ashley Creek admits would have cost $67 million in capital in 1990. Because Ashley Creek has not established the necessary steps to show its viability in that market, it would be too speculative and remote to recognize the leasehold interest as being injured. The mineral leases only hold value if the minerals can be economically mined, milled, and sold. Without showing that its leases could be developed economically, Ashley Creek can only speculate on the leases' value. Accordingly, Ashley Creek does not have standing to bring antitrust claims on the basis of an alleged injury to its leases.

II. ARE THE SF TARIFFS REASONABLE AND NON-EXCLUSIONARY?

Ashley Creek has claimed that the tariffs for the Pipeline were not reasonable and that the SF Defendants' claim that their fourth rate retroactively makes the other tariffs reasonable is unsupported by any authority. It also argues that a

retroactively reasonable rate is irrelevant to antitrust liability. In contrast, the SF Defendants argue that based on Ashley Creek's "best case" start date of 1989 and the fourth tariff implemented effective January 1, 1999 (which will not be increased during the relevant period except to recover increased operating costs or capital costs), the court cannot rule that the tariffs were exclusionary. The SF Defendants contend that this is another independent basis on which the court can find that Ashley Creek has no standing to bring antitrust claims. The SF Defendants argue, and the court agrees, that using the most current data available to determine if the tariffs are reasonable is precisely the approach adopted by the STB and is consistent with the stand alone cost ("SAC") method of evaluating rates.

The SF Defendants adopted the same third tariff that had been in place since February 28, 1992. Assuming Ashley Creek shipped its claimed volume of 1.085 million tons per year in addition to what SF was shipping the tariff generally would have been $4.60 per ton. Effective January 1, 1999, the SF Defendants adopted a fourth and still lower tariff, which collects only variable and fixed costs and provides no recovery for original construction costs or the cost of capital. Assuming Ashley Creek shipped its claimed volume of 1.085 million tons per year in addition to what SF was shipping, the tariff generally would have been approximately $2.15 for 1999.

[8, 9] The court has already ruled (1) that the STB did not hold that the SF Defendants tariffs were unreasonable, and (2) unreasonable does not necessarily mean exclusionary. As explained below, the court finds that the SF Defendants' tariffs were not unreasonable, and thus, they were not exclusionary. First, the United States Supreme Court has long held that a private antitrust action cannot be maintained based upon a

lawful rate filed with the ICC (now the STB). *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156, 162-65, 43 S.Ct. 47, 67 L.Ed. 183 (1922); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986); *see* also *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445 (6th Cir. 1988). Thus, if the SF Defendants' rates were reasonable under the methodology employed by the STB, then as a matter of law, Ashley Creek has not been denied access to the Pipeline. Relying on the diskettes provided by the STB, which the STB used to compute the over- and under-collections under the formula used in its October 1996 decision, the SF Defendants have demonstrated that the two tariffs published by SF are reasonable under the STB's methodology. Moreover, they have demonstrated that even if the Chevron tariffs are included in the calculation, the tariffs are reasonable, and, as a matter of law, not a severe handicap.

In its October 1996 decision, the STB held that the tariffs were reasonable if the hypothetical stand-alone pipeline charging the same rates would have collected less than its costs, including recovery of construction costs and its cost of capital. (STB Decision at 39, attached as Attachment D to the SF Defendants' Supporting Memorandum). The STB's methodology provides for recovery of the construction costs on a "level rate per ton in real terms." (*Id.* At 30.) As a result, depreciation cannot be known until the total number of tons shipped is known or assumed and until the "time pattern" of that volume is known or assumed. The volume and the "time pattern" of that volume is thus critical in measuring reasonableness. A heavily disputed issue before the STB was whether there was a market for phosphate concentrate beyond the usage of the Chevron/SF fertilizer plant in Rock Springs. The STB did not decide that issue, saying that it was for the

court to determine whether Ashley Creek was ever in a position to market phosphate, or will be in the future, and to determine the size of the potential market for phosphate that could be delivered by the Pipeline. (*Id.* at 41.) The STB did, however, consider two different volume scenarios at the extremes. The first scenario, advocated by the SF Defendants, assumed that the market for phosphate concentrate milled in Vernal was limited to what the Chevron/SF fertilizer plant in Rock Springs could use. Under that scenario, there was no additional market demand and if Ashley Creek ever shipped on the Pipeline, its product would simply replace that otherwise shipped from the Chevron/SF mine. The second scenario, advocated by Ashley Creek, assumed that there was a market beyond the demand of the fertilizer plant in Rock Springs. The STB said that it regarded this second scenario as "intuitively less compelling." (*Id.*)

The SF Defendants have demonstrated that under the actual Chevron and SF volumes to October 31, 1999, and the most recent projected future volumes of SF, there is a net under-collection of $4,158,000 during the 20-year period 1986-2006 when the revenues collected under all four tariffs are considered. The STB ruled that Chevron should have published a tariff on November 25, 1986, and it therefore used December 1, 1986 as the start date for measuring reasonableness. The earliest Ashley Creek would have been prepared to ship on the Pipeline was three years after publication of a "reasonable rate," or December 31, 1989.

Even assuming Ashley Creek's best case scenario-that Ashley Creek can profitably ship its proposed 1.085 million tons of slurry annually and sell it beyond Rock Springs-and even assuming that it is appropriate to charge the SF Defendants with over-collections during the Chevron period,

this best-case scenario still shows an under-collection over the entire 20 years of $436,000, even including both (a) the $16,176,000 over-collection during the Chevron period and (b) the $11,890,000 over-collection during the period Ashley Creek was not shipping. There would have been no over-collection during any year of the SF period and a total under-collection of $90,269,000 during the 17 years Ashley Creek was shipping.[8]

Moreover, before even an "unreasonable" rate can be exclusionary under the essential facilities doctrine, it must result in a "severe handicap" to competition. *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 652 (10th Cir.1992), *cert. denied,* 506 U.S. 831, 113 S.Ct. 96, 121 L.Ed.2d 57 (1992) *overruled in part on other grounds, Systemcare Inc. v. Wang Lab. Corp.* 117 F.3d 1137 (10th Cir.1997). Here, because of a net under-collection, there is not even an unreasonable rate, let alone a "severe handicap."

This is particularly true when the only reason the net collections are even close to a net over-collection is because of the significant over-collections during the first three years under the Chevron tariff when Ashley creek admitted it would not be shipping. That is, during the time only Chevron would have been shipping, the cumulative over-charge was $11,890,000 which Chevron paid to itself. During the period that Ashley Creek would have been shipping, there was no over-charge. In fact, there was an under-collection of $12,326,000.

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[8] Ashley Creek has not disputed that using updated volumes and revenues and an Ashley Creek start date of December 1989, there is a net under-collection over the STB's 20-year model, even if the over-collections during the Chevron period are charged to the SF Defendants.

The SF Defendants point out that Ashley Creek has changed its position by now arguing that the fourth tariff cannot be used to determine if the tariffs are unreasonable. Ashley Creek previously argued that updated information should be included in determining whether the tariffs are reasonable. The SF Defendants correctly argue that Ashley Creek cannot have it both ways. Either all four tariffs must be viewed together in the 20-year model, in which case they result in an under-collection and are reasonable. Or, each tariff must be analyzed for its own reasonableness, an analysis that the STB did not do for any of the three tariffs but which would demonstrate that both the third and the fourth tariffs were reasonable while they were in effect.

Finally, as discussed above regarding standing, Ashley Creek does not know its costs to produce any better than a margin of plus or minus 25%. In 1992, Ashley Creek estimated its costs to be $36.11 per ton with a margin of error ranging from $27.08 to $45.13. Even if the best case scenario showed a net over-collection, such an over-collection can hardly be a severe handicap to entry into the market when the entrant's own costs could vary by 25%. That is, the margin of error in Ashley Creek's cost estimates (plus or minus $9.00 per ton) far exceeds the *entire* tariff Ashley Creek would have been charged by SF Defendants (generally $4.60 under the third tariff and approximately $2.15 during the fourth tariff).

Accordingly, the court finds that the tariffs were reasonable under the STB methodology, and therefore, as a matter of law, did not deny Ashley Creek access to the Pipeline. In addition, the court finds that the reasonable tariff was not discriminatory. Thus, there is no antitrust liability on the part of the SF Defendants based on its tariffs.

III. SHOULD ASHLEY CREEK'S COUNTS X AND XII BE DISMISSED?

[10] In Count XII, Ashley Creek claims that Chevron and the SF Defendants violated their obligations under FLPMA, Specifically, Ashley Creek asserts that the federal right-of-way permit granted for the pipeline requires SF Pipeline to grant Ashley Creek access on a "non discriminatory and reasonable" basis. The Tenth Circuit has expressly held that the FLPMA does not provide for a private cause of action. *State of Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir.1998). In addition, the SF Defendants claim that Count X, involving a "federal right of way," is premised on the same FLPMA claim and should be dismissed for the same reasons. They claim that Ashley Creek does not, and cannot, allege that the SF Defendants denied Ashley Creek physical access to the property or that Ashley Creek has been denied access to the Pipeline. Rather, Ashley Creek argues only that the tariff was too high. Ashley Creek cites no authority for the proposition that a common law right of an easement by implication can be converted and extended to a federal right to have the federal courts determine whether a common carrier tariff is too high. Moreover, Ashley Creek does not dispute the SF Defendants' argument that Ashley Creek's claim for a federal easement, which was asserted in 1998, is rendered moot by the 1997 SITLA agreement, which guarantees access at a rate that only covers fixed and variable costs-a rate lower than an owner would need to recover its investment.

For the reasons advanced by the SF Defendants, the court agrees that Counts X and XII of Ashley Creek's Second Amended Complaint should be dismissed.

IV. SHOULD ASHLEY CREEK'S COUNT XI BASED ON STATE NUISANCE LAWS BE DISMISSED?

[11] The SF Defendants argue that Ashley Creek's claim based on state nuisance laws should be dismissed if the federal claims are dismissed. Pendent state law claims should be dismissed if the federal claims are dismissed before trial. *Bauchman v. West High School*, 132 F.3d 542, 549 (10th Cir.1997)("[I]f federal claims are dismissed before trial, leaving only issues of state law, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice") (quotations and citations omitted). This court agrees that Count XI of Ashley Creek's Second Amended Complaint should be dismissed without prejudice.

CONCLUSION

For the reasons set forth above, the SF Defendants' Motion for Summary Judgment is **GRANTED** and Counts I-X and XII are **DISMISSED** with prejudice, and Count XI is **DISMISSED** without prejudice. The previous Order in this case, dated June 27, 2000, is **VACATED**.

This Amended Order will be filed under seal for 30 days from the date on which it is entered, at which time it will become unsealed, unless the court enters an Order-upon motion by one or both of the parties-to permanently seal the Amended Order. In addition, all currently pending motions filed by the SF Defendants are hereby denied as moot, unless the SF Defendants notify the court within 10 days from the date the Amended Order is entered that any pending motion need be decided. According to the court's docket, the following motions are still pending:

(1) Motion by SF Defendants for Reconsideration of Order Denying Protective Order (docket #261);

(2) Motion by SF Defendants for Leave to File Amended Counterclaim (docket #330);

(3) SF Defendants' Objection to Magistrate Judge's Denial of Motion for Sanctions (docket #598); and

(4) SF Defendants' Objection to Magistrate Judge's May 2, 2000 Order (docket #600).

Each party shall bear its own costs.

TAB 4

DOCKET NO. 40131
ASHLEY CREEK PHOSPHATE COMPANY
v.
CHEVRON PIPE LINE COMPANY

Decided January 31, 1989

Defendants required to establish rates and publish a tariff for transportation of phosphate by slurry pipeline. General guidance given regarding the manner in which the reasonableness of the rates published by defendants would be judged. Request for damages and attorneys' fees denied.

DECISION

BY THE COMMISSION:

In this proceeding, complainant seeks a rate prescription for movements of slurry phosphate through defendants' pipeline in Utah and Wyoming.[1]

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[1] Ashley Creek's complaint named Chevron Pipe Line as defendant. Chevron U.S.A., Inc., an affiliate of Chevron Pipe Line, interposed itself as a defendant because it owns the phosphate slurry pipeline that is at the center of this controversy.

Chevron U.S.A. notes that Chevron Pipe Line has the responsibility of owning and managing those Chevron pipelines that are subject to the Interstate Commerce Act (ICA) and that operate under a tariff. Chevron U.S.A. has stated that the phosphate slurry pipeline would be transferred to Chevron Pipe line when it met both of these criteria. But in response to the ALJ's comments at the hearing, Chevron U.S.A. further states that it has transferred the

Defendants have no published rates, and claim that none are needed until complainant is prepared to begin shipping. In his Initial Decision, the Administrative Law Judge (ALJ) found that the complainant had failed to establish a sufficient basis for the immediate publication of any rate. The ALJ recommended: (1) that the parties be required to resume negotiations and establish a contract rate within two years; and (2) that the complaint be dismissed without prejudice to reopening should the parties fail to reach agreement within the two year period. We are considering here separate appeals to the Initial Decision filed by the complainant and the defendants.[2]

Upon review of the record, we conclude that the ALJ erred by not requiring defendants to file a tariff and by requiring the parties to negotiate a contract. We therefore are granting the request by complainant Ashley Creek Phosphate Company (Ashley Creek) that defendants Chevron Pipe Line Company (Chevron Pipe Line) and Chevron U.S.A., as common carriers by pipeline, be required to establish rates and publish a tariff in accordance with 49 U.S.C. §§ 10702(a) and 10762 for the transportation of phosphate through defendants' phosphate slurry pipeline between Vernal, UT, and Rock Springs, WY. We also offer general guidance regarding how we would judge the reasonableness of the rate

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phosphate slurry pipe line and related facilities to Chevron Pipe Line.

Our action in this proceeding is directed at whichever Chevron entity is to operate the pipeline and we expect that entity to comply with our order.

[2] We deny complainant's request for oral argument. We have a record before us that is adequate to resolve the issues.

defendants publish. We are denying complainant's request for damages because Ashley Creek has not shown that it has sustained ascertainable direct harm from defendants' failure to establish rates and publish a tariff. Ashley Creek's request for attorneys' fees under 49 U.S.C. §11705(d)(3) is inappropriate and is denied.

BACKGROUND

Defendants, Chevron Pipe Line and Chevron U.S.A. are members of the Chevron Corporation (Chevron) corporate family.[3] Chevron U.S.A. owns a phosphate mine in Uintah County, UT, a phosphate mill at Vernal, UT, and a phosphate slurry pipeline that extends from Vernal to Rock Springs, WY. Another Chevron affiliate, Chevron Chemical Company (CCC), uses phosphate mined and milled by Chevron U.S.A. to produce fertilizer at its plant at the terminus of the pipeline in Rock Springs. CCC also sells phosphate rock it obtains from Chevron U.S.A. Still another Chevron affiliate, Chevron Resources Company (CRC), operates Chevron U.S.A.'s slurry pipeline and facilities at Vernal.

Chevron constructed its phosphate slurry pipeline in 1985 and 1986 and began transporting phosphate slurry in May 1986.[4] pipeline greatly exceeds the capacity of

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[3] We will on occasion refer to defendants and/or their affiliates simply as "Chevron".

[4] Chevron's pipeline was built over a right-of-way granted by the Bureau of Land Management (BLM), Department of the Interior. BLM desired to limit the number of pipelines through this environmentally sensitive area. It therefore granted the right-of-way with the understanding that Chevron's pipeline would be operated

Chevron's Rock Springs plant. When it constructed the pipeline, Chevron considered building a pipeline made of 8-inch pipe with three pumping stations, but found that by expanding the pipe to 10 inches it could eliminate a pumping station. Consequently, Chevron was able to expand the pipeline's capacity to allow for future expansion of its Rock Springs operations, while reducing total construction costs.

Complainant Ashley Creek holds mineral leases to mine phosphate on approximately 2,852 acres of land[5] in Uintah County, UT, near Chevron's operations and has filed prospecting applications for an additional 3,000 acres on Federal land in the same vicinity. Complainant does not ship phosphate at this time. Ashley Creek has not developed its mineral rights because, it contends, it has been unable to obtain specific information about the rates it would have to pay to transport its potential phosphate traffic. Ashley Creek thinks that its phosphate can be transported most efficiently by pipeline and wants Chevron to publish a tariff for phosphate shipments so that it can determine whether it would be economically practical to develop its phosphate holdings.

On November 4, 1986, in response to Ashley Creek's request for rate information for phosphate pipeline movements, Chevron provided preliminary estimates of a

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as a common carrier subject to the jurisdiction of this Commission. *See* Initial Decision at Appendix C.

[5] The Division of State Lands and Forestry (Division) of the State of Utah is the lessor of Ashley Creek's existing phosphate leases. The Division intervened in support of the complainant because Ashley Creek's inability to develop the leases would result in the loss of potential royalties to the intervenor.

tariff rate expressed in dollars per ton of phosphate concentrate (on a dry rock basis) for various levels of traffic ("throughput"). Chevron also indicated that complainant's use of the pipeline would be subject to Chevron's rules requiring shipment segregation, facilities construction, and water transportation and consumption. Ashley Creek was not satisfied with Chevron's response and, on November 25, 1986, filed its complaint.

Ashley Creek's complaint alleges that Chevron has operated the pipeline since June 1986 without a published tariff in violation of 49 U.S.C. §§ 10702, 10761, and 10762. The complaint charges that Chevron's rate proposals were unreasonable in violation of 49 U.S.C. §§ 10701, 10704(b)(2), and 10762. Ashley Creek alleges that Chevron's proposed rates and pipeline access rules were "part of a scheme" to deny complainant access to the slurry pipeline and to prevent it from competing with various of the Chevron companies. Ashley Creek asserts that Chevron violated 49 U.S.C. § 11101 by "fail[ing] to provide a reasonable rate and tariff, and rules and practices for carriage on [Chevron's] pipeline" in the face of Ashley Creek's request. It suggests that Chevron was aware that this failure impaired Ashley Creek's ability to plan the development of its properties.

By way of relief, Ashley Creek asked that the Commission require Chevron to publish a tariff with reasonable rates and to establish appropriate rules and practices. Complainant also requested that the Commission assess damages and attorneys' fees against Chevron under 49 U.S.C. § 11705(b)(2) and (d)(3).

In response, Chevron acknowledged that its pipeline operation is subject to our jurisdiction. Nevertheless, Chevron denied that it violated the Interstate Commerce Act (ICA) by operating without a tariff because, it claimed, it was not a common carrier for hire, noting that it carried phosphate only for itself and that no third party had requested access to the pipeline. Chevron concluded that, under the circumstances, it was not required to file a tariff.[6]

Chevron further argued that its preliminary tariff figures were formulated using "traditional public utility ratemaking methods" and that its operating rules were reasonable in light of the constraints involved in operating a phosphate slurry pipeline. Chevron noted that Ashley Creek filed its complaint without discussing the preliminary rates with defendants. Chevron also argued that construction of additional facilities was needed to accommodate a third party's shipments.

Chevron rejected Ashley creek's claim that it had thwarted complainant's development of its properties and suggested that "since Complainant's initial contact with the Defendant in February of 1984, Defendant has fully cooperated with Complainant." Chevron U.S.A. urged that the complaint be dismissed, or in the alternative, that the complaint be held in abeyance while the parties

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[6] It may appear facially inconsistent for Chevron to argue that it is not a common carrier subject to our regulation while admitting that it is subject to our jurisdiction. However, the discussion, *infra*, regarding *United States v. Champlin Rfg. Co.*, 341 U.S. 290 (1951) indicates when, and under what circumstances, a pipeline carrier becomes a common carrier.

reviewed Chevron's proposed rates and operational rules in an attempt to settle the dispute.

Oral hearing was held, a substantial record was compiled, and the Initial Decision was issued May 31, 1988. The ALJ determined that, although it was a common carrier by pipeline, Chevron did not have to file a tariff because Ashley Creek was not yet able to ship phosphate.[7] Nevertheless, the ALJ noted that Ashley Creek's intent to ship phosphate was not frivolous and that complainant had a need for a published tariff for movements through Chevron's pipeline.

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[7] The ALJ correctly declined to rely on a letter dated June 17, 1983, from the then Deputy Director of the Commission's Office of Proceedings (Rail Section) concerning a molten sulphur pipeline to be operated by Chevron U.S.A. because it is a different pipeline with a different set of facts. Initial Decision at 4. In that letter, the Deputy Director suggested that Chevron need not file a tariff because the molten sulphur pipeline would perform no for-hire transportation. The Deputy Director indicated Chevron needed only to certify annually to the Commission that it was maintaining the molten sulphur pipeline's accounts in accordance with the Commission's uniform system of accounts for pipelines.

The facts with which the June 17, 1983, letter are concerned are easily distinguished from those in this proceeding. The molten sulphur pipeline had not yet attracted a potential shipper for which a tariff was required. Here, to the contrary, we have Ashley Creek, a shipper claiming need for a tariff to aid in determining the feasibility of its development and, eventually, to move its phosphate.

In any event, the June 17, 1983, letter was merely an informal staff opinion and is not binding on the Commission. Nevertheless, we assess no damages for Chevron's failure to file a tariff.

The ALJ also described how Chevron should establish rates for movements of Ashley Creek's phosphate. The ALJ noted that differential pricing was appropriate for transportation through the pipeline, but rejected Ashley Creek's primary justification for differential pricing. Initial Decision at 7. Under complainant's scheme, Chevron would pay a higher rate for primary service while Ashley Creek would pay a lower rate for an inferior interruptible service, *i.e.*, if the demand for the pipeline's services were to exceed capacity, Chevron's traffic would take precedence. Instead, the ALJ noted that the pipeline's capacity greatly exceeds any projected demand, including Ashley Creek's incremental load. Furthermore, the ALJ noted that Chevron's policy and operational history tended to show that Chevron would prorate capacity among shippers in the unlikely event that shippers' demand exceeded full capacity. Initial Decision at 7. The ALJ concluded that Ashley Creek would not receive an inferior service and therefore should not enjoy a more favorable rate.

The ALJ, however, accepted Ashley Creek's alternative justification for differential rates, *i.e.*, shipments of phosphate moving beyond Rock Springs required a lower rate to compete in markets other than Rock Springs.[8] Initial Decision at 9.

The ALJ concluded that, although a tariff was appropriate, Chevron should not be required immediately to file a tariff. He noted that Ashley Creek would not

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[8] The ALJ was unable to determine the details of Chevron's experience in marketing phosphate rock to points in Canada because Chevron refused to disclose its so-called "Cominco contract." Initial Decision at 9.

become a shipper for two years at the earliest. In view of the possibility that rates could change, he feared that a tariff could become obsolete once Ashley Creek is ready to ship. Initial Decision at 17. Instead, the ALJ dismissed Ashley Creek's complaint and ordered Ashley Creek and Chevron to negotiate a differential rate to be filed by Chevron within two years. *Id.* At 18.

DISCUSSION AND CONCLUSIONS

Tariff Filing Requirement. The fundamental issue is whether Chevron must now file a tariff. Our jurisdiction extends to "transportation * * * by pipeline * * * when transporting a commodity other than water, gas or oil * * * between a place in—a State and a place in another State * * *" 49 U.S.C. § 10501(a). Chevron does not dispute the applicability of this statutory provision to its operations. *See* Appeal of Chevron from Initial Decision, filed July 15, 1988, at 6, and note 4, *supra.*

Furthermore, "[a] carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall publish and file with the Commission tariffs containing the rates and * * * if a common carrier, classifications, rules and practices related to those rates * * * " 49 U.S.C. §10762(a)(1)(A).

Chevron suggests that it fits within an exception to the tariff filing requirement that arose in connection with interpretations of this agency's former jurisdiction over oil pipelines under the Hepburn Act of June 29, 1906. 34 Stat. 584. Shortly after passage of the Hepburn Act, a number of oil pipelines sought to avoid the Act's coverage

by arguing that they owned the oil they transported and did not hold themselves out to the public as common carriers. In *The Pipe Line Cases*, 234 U.S. 548 (1914),[9] the Supreme Court ruled that the Act subjected to regulation as common carriers all pipelines transporting oil in interstate commerce and required the pipeline companies to file schedules of rates and charges. The Court recognized that the affiliated oil companies controlled most pipeline facilities and were able to exert market power to force small oil producers to sell their oil to the affiliates prior to transportation through the pipelines. The Court found that the Act brought "within its scope pipe lines that although not technically common carriers yet were carrying all oil offered, if only the offerers would sell at their price. *Id.* At 560. As the Court later explained, "the Act was passed to eliminate the competitive advantage which * * * integrated pipelines might possess from exclusive ownership of a pipeline." *United States v. Champlin Rfg. Co.*, 341 U.S. 290, 297 (1951) (*Champlin II*).

As an exception to its finding that the pipelines were common carriers and had to file tariffs, the Court, in the *Pipeline Cases, supra*, found that one of the companies, the Uncle Sam Oil Company, was not a common carrier because it transported only oil produced from its own wells to its own refinery and did not transport oil purchased from others. When the Court, in *Champlin II, supra,* at 298, revisited the issue of which pipelines were common carriers (and were required to file a tariff) under the Act, it suggested that:

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[9] Although the Commission no longer has jurisdiction over oil pipelines, these cases are instructive concerning our remaining jurisdiction over transportation of other commodities via pipeline.

The term "all pipe lines" was meant to impose full regulation on integrated producer pipelines who exploit a competitive advantage simply by refusing to deal with independent producers having no comparably cheap method of reaching consuming markets. But * * * Congress, in adopting a term broad enough to cover all competitive imbalances which might arise, [did not intend} that the Commission should make common carriers for hire out of private pipe lines whose services were unused, unsought after, and unneeded by independent producers.

Chevron clearly does not fall within the exception from common carrier status (and the tariff filing requirement) as delineated by the *Pipeline Cases, supra,* and *Champlin II, supra.* Chevron is an integrated pipeline operator the Act was meant to cover. It has a facility that independent producers, such as Ashley Creek, need to transport their commodity.[10] Ashley Creek has stated its interest and need to use Chevron's pipeline when its production starts.

Chevron also suggests we evaluate complainant's need for a tariff using a test developed in construing Section 4 of the Clayton Act, called the "intention and preparedness test."[11] Chevron, however, ignores an

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[10] BLM recognized the need to limit the number of pipelines and recognized Chevron as a common carrier. *See* note 4, *supra.*

[11] *See e.g., Central Telecommunications, Inc. v. TCI Cable Vision, Inc.,* 800 F.2d 711, 727-28 (8th Cir, 1986), *cert, denied,* 107 S. Ct,1358 (1987) and *Denver Petroleum Corp. v. Shell Oil Co.,*306 F. Supp. 289, 308-08 (D. Colo. 1969). Courts often apply this test to a plaintiff who claims that the defendant's anticompetitive conduct injured the plaintiff by thwarting the plaintiff's attempt to enter a market (the "potential entrant"). This is to be distinguished from the plaintiff who claims injury in the form of reduced or eliminated profits from a business established in the market made to

important distinction. Section 4 of the Clayton Act does not govern access to information. Rather, it governs the right to receive money damages. By contrast, 49 U.S.C. § 10762 (d)(1)(a). Consequently, we do not find Chevron's analogy to Section 4 of the Clayton Act useful in construing the tariff filing requirement of the ICA and it does not support Chevron's narrow construction of that requirement.

The proper construction of § 10762(a) requires a common carrier subject to the Commission's jurisdiction to file a tariff when presented with a potential shipper with a demonstrable business or business planning need for the information. This holding is supported by Congress's instruction to us "to encourage the *establishment* and maintenance of reasonable rates for

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malfunction by anticompetitive conduct (the "established businessman").

Obviously, measuring the potential entrant's damages is more difficult than measuring those of the established businessman. *See Grip Pal, Inc. v. Illinois Tool Works, Inc.*, 694 F. 2d 466, 475 (7tj Cir. 1982), *cert. denied,* 461 U.S. 958 (1983). The obvious uncertainty of success of the plaintiff's venture, even absent the anticompetitive conduct, can so cloud the question that the calculations can become conjectural. Nevertheless, the policy of Section 4 of the Clayton Act is to induce injured plaintiffs to punish violators by offering the reward of treble damages, a policy that would be fettered were all potential entrants denied damage awards. *See id.; see also Illinois Ex Rtel. Hartigan v. Panhandle Eastern Pipe line Company,* 852 F.2d 891, 897 (7th Cir. 1988) (*en banc),* petition for *cert.* pending. No. 88-658 (filed Oct. 17, 1988(discusses damages for claims of lost sales by ongoing concern). The "intention and preparedness" test is used to determine when a potential entrant is eligible to collect treble damages.

transportation * * * " 49 U.S.C. §10101a(1)(D). (Emphasis added.) The Interstate Commerce Act (ICA) grants shippers a right to this information in the form of a tariff.

In *San Antonio, TX v. Burlington Northern, Inc.*, 355 I.C.C. 405, 407, 413 (1976), *aff'd sub nom. Burlington Northern, Inc. v. United States*, 555 F.2d 637 (8th Cir. 1977) (*San Antonio I*), we implied that we would have required the carrier to publish a tariff containing a unit-train rate (even though the carrier had a class rate on file) had the carrier not published a unit-train tariff during the course of the proceeding. *San Antonio I, supra,* at 418. *San Antonio I, supra*, also shows the problems that can arise if shippers rely upon informal estimates of carrier rates rather than on filed tariffs. *See San Antonio I, supra,* at 407. *See also San Antonio, TX v. Burlington Northern, Inc.*, 359 I.C.C. 1 (1978).

The Commission has said that it would not "prescribe rates for a purely hypothetical change in transportation characteristics that may arise in the future." No. 36579, *Houston Lighting & Power Company v. Burlington Northern, Inc., et al.* (not printed), served August 22, 1978 (*HL&P).* In that proceeding, however, there was already in existence an effective tariff governing the transportation of the complainant's coal over the route of movement at issue, and the rate and other conditions of that tariff had been found to be lawful. *HL&P, supra,* unprinted decision served February 6, 1978. Furthermore, the transportation characteristics on which the effective tariff was based were those described by the complainant and used by the defendant in designing the tariff.

The situation in *HL&P*, *supra*, is easily distinguished from what Ashley Creek faces here. Ashley Creek is not asking Chevron to change its tariff to reflect unnecessary and hypothetical events. Instead, Ashley Creek is without any tariff at all on which to base its business decisions.

The ALJ feared that a tariff filed by Chevron Pipe Line would become obsolete by the time that Ashley Creek was ready to ship. While that may be true, Ashley Creek nevertheless is here entitled to the best available information for its business planning purposes. Chevron's November 1986 estimate is not a tariff, is inadequate under the ICA, and will not satisfy a prospective shipper's needs. By definition, the estimate lacks certainty.

The Commission has always recognized the importance of a tariff in enabling a business to make an informed decision on transporting its products. *See Rice v. Louisville and Nashville Railway Company,* 1 I.C.C. 503, 532 (1888). The Commission and the courts have recognized that consideration of precedents relating to railroad and motor carrier operations in cases involving pipelines must be subject to "careful review of circumstances of pipeline operations." *United States Dept. of Defense v. Interstate Storage and Pipeline Corp.*, 353 I.C.C. 397, 401 (1977; *Farmers Union Central Exchange v. FERC,* 584 F.2d 408, 413 (D.C. Cir.), *cert. denied,* 429 U.S. 995 (1978). Therefore, we recognize that our decision in this case must turn on the specific facts of record and that its future precedential effect is accordingly limited. The record in this case, shows a pipeline that is admittedly a common carrier and a

potential shipper that has specifically requested tariff publication and whose plans for future development are contingent upon reliable rate information. On this record, we believe that application of the tariff filing principles adopted in the railroad context is appropriate. Therefore, we will require Chevron to file a tariff pursuant to §§ 10702(a), 10761(a), and 10762(a)(1)(A), and in compliance with 49 C.F.R. Part 1312 within 90 days of the date of service of this decision.[12]

Maximum Reasonableness Guidelines. We have established that defendants must file a tariff. We take this opportunity to offer some general guidance. While our order directing that defendants file a tariff within 90 days supercedes the ALJ's negotiation directive, negotiation can play an important role in producing a tariff that both Ashley Creek and Chevron find acceptable. Should Chevron and Ashley Creek work together and arrive at a tariff in which they both concur, we would not anticipate a protest by Ashley Creek. This result would be most advantageous for all concerned. Of course, Ashley Creek or any other party may challenge that tariff via protest or complaint.

Chevron asserts that differential pricing is inappropriate for movements through its pipeline because, under differential pricing, one shipper would receive an advantage denied other shippers.[13] Chevron

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[12] Because we are directing that a tariff be filed, we need not address the ALJ's directive that a contract rate be negotiated.

[13] Chevron also argues that the Initial Decision is inconsistent with recent orders of the Federal Energy Commission concerning oil

acknowledges that this agency has prescribed differential rates for railroads. It argues, however, that its pipeline has never been revenue inadequate and, therefore, should not be treated as are railroads.[14] Ashley Creek argues that differential pricing should not be limited to revenue inadequate railroads.

In establishing rates, Chevron should look to *Coal Rate Guidelines, Nationwide,* 1 I.C.C.2d 520 (1985) (*Guidelines*), *aff'd sub nom. Consolidated Rail Corporation v. United States,* 814 F.2d 1444 (3d Cir. 1987) for guidance. In that proceeding we adopted Constrained Market Pricing (CMP) to determine the reasonableness of rates to be paid by rail-captive coal

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pipelines. The decisions of that agency, although they may be helpful, are not binding upon this Commission.

[14] Chevron presents a number of arguments that need not be addressed until it has filed a tariff and then only if its rate has been challenged. For example, Chevron notes that its cost of transporting one ton of phosphate slurry is the same regardless of whether that one ton moves beyond Rock Springs. Chevron claims that the record does not support a differential rate because the western fertilizer market is not a distinct geographic region with definable economic boundaries. Rather, Canadian producers participate in this market. Chevron also claims that there is no evidence to show that Canadian fertilizer manufacturers suffer any competitive disadvantages due to transportation costs or that, if there is such a competitive disadvantage, it would be visited upon Ashley Creek. Nor need we address here complainant's response that there is no evidence to enable the Commission to ascertain that Canadian-manufactured fertilizer competes with Chevron's fertilizer.

shippers.[15] Most notably, our use of the stand-alone pricing concept appears relevant here.

One noted observer has said that "the pipeline industry can be considered as naturally monopolistic, that is, a single large pipeline in a given market could operate more cheaply than a number of companies with smaller pipe." D. Locklin, *Economics of Transportation* at 605 (6th Ed. 1966).

CMP, which was formulated to address rate concerns of captive rail shippers, should be a useful analytical tool to apply to ratemaking for the phosphate slurry pipeline. Pipelines and railroads share the characteristic of high fixed costs and are capital intensive. Furthermore, Ashley Creek's potential traffic appears quite similar to unit train, large volume coal movements to which we have applied the tests of *Guidelines, supra,* absent a persuasive showing that those principals should not apply.

Other matters. Finally, the ALJ made a number of findings and conclusions concerning specific tariff issues

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[15] The goals of CMP are that: (1) a captive shipper should not be required to pay more than is necessary for the carrier(s) involved to earn adequate revenues; (2) a captive shipper should not pay more than is necessary for efficient service; (3) a captive shipper should not bear the costs of any facilities or services from which it derives no benefit; and (4) responsibility for payment for facilities or services which are shared (to its benefit) by other shippers should be apportioned according to the demand elasticities of the various shippers. *See* 1 I.C.C.2d at 523-24. In addition, any change in rates should be gradual enough to avoid economic dislocations. *Id.* at 524.

(*e.g.*, capital structure, return on equity, and rate design) that, in light of our action here, are premature. These findings and conclusions are vacated, and we need not address in detail the parties' criticism of them.[16]

The Initial Decision did not resolve Ashley Creek's claim for damages. Ashley Creek assumes that the failure to order damages is tied to the ALJ's refusal to require Chevron Pipe Line to file a tariff immediately. Ashley Creek contends that damages should be awarded to deter other common carriers from failing to file tariffs at the appropriate time. Complainant also seeks attorneys' fees.

Chevron contends that Ashley Creek has suffered no direct injury to justify an award of damages and that only a district court can award attorney's fees.

Ashley Creek's claims for damages under 49 U.S.C. § 11705(d)(3) are denied. Ashley Creek admits that it is not ready to ship phosphate rock and has not suffered any

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[16] Chevron criticizes the ALJ's conclusion that the pipeline should be viewed as having a capital structure that consists of one-third equity and two-thirds debt. Chevron claims that the pipeline does not qualify for debt financing. The pipeline has no take-or-pay or ship-or-pay contract with a shipper nor does the pipeline serve an established market consisting of a large number of customers. Also, continued operation of the pipeline poses large technological risks.

Ashley Creek asserts that, had the pipeline been established independently of the other Chevron entities, the pipeline would have secured a take-or-pay contract. Ashley Creek goes on to argue that, since the pipeline would have secured a take-or-pay contract at the outset of its operation, the pipeline would have protected itself from the technological risks that Chevron mentioned

direct damage. *See* Ashley Creek's Appeal and Request for Oral Argument, filed July 13, 1988, at 5 ("Complainant has not had an existing business in place to be damaged by this behavior."). Ashley Creek's contention that it "has lost time and has been required to assume very substantial costs in compelling defendant to recognize its obligations and in demonstrating the appropriate tariff" does not justify awarding damages here. Although Chevron's failure to file a tariff may have caused complainant to incur certain expenses, the relationship is too indirect to permit us to award damages under 49 U.S.C. § 11705(b)(2). Before any party can recover under the Act, he must show not merely the wrong of the carrier, but that the wrong has in fact operated to his injury. *Pennsylvania Railroad Company v. United States,* 230 U.S. 184, 200 (1913) (*quoting Parsons v. Chicago and North Western Railway Company,* 167 U.S. 447, 460 (1897)).

In addition, to the extent that some of Ashley Creek's expenses are litigating costs, we may not award them. *See Industrial Commission v. New Jersey & New York Railroad Company,* 324 I.C.C. 272, 273 n.1 (1965). For example, we do not have authority to award attorneys' fees to Ashley Creek. *See Hightower Box & Tank Co., Inc. v. Alabama G.S.R. Co.,* 294 I.C.C. 503 (1955). The section cited by complainant (§ 11705(d)(3)) clearly states that "[t]he District Court shall award a reasonable attorney's fee" (emphasis added).[17]

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[17] And even the District Coutts do not have authority under §11705(d)(3) to award litigating costs or attorneys' fees absent a findings of liability and an award of damages. *Illinois C.G.R. Co. v. Delta Millwork, Inc.*, 802 F.2d 156, 157-58 (5th Cir, 1986). In this case, we have not found Chevron liable for damages.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. To the extent that it is inconsistent with this decision, the Initial Decision is vacated.
2. Ashley Creek's appeal is granted to the extent discussed above. In all other respects, it is denied.
3. Chevron's appeal is denied.
4. Chevron must establish rates and file with the Commission a tariff for the transportation of phosphate through defendants' slurry pipeline by May 8, 1989. The tariff must satisfy the requirements of 49 U.S.C. § 10762 and 49 C.F.R. Part 1312.
5. Ashley Creek's request for damages and attorneys' fees is denied.
6. Ashley Creek's request for oral argument is denied.
7. This decision is effective on March 9, 1989.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips.

TAB 5

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EB

SURFACE TRANSPORTATION BOARD[1]
DECISION

No. 40131 (sub-No.1)

ASHLEY CREEK PHOSPHATE COMPANY
v.
CHEVRON PIPE LINE COMPANY, ET AL.

No. 40810

ASHLEY CREEK PHOSPHATE COMPANY
v.
SF PHOSPHATES LIMITED COMPANY, ET AL.

Decided: October 28, 1996

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 State. 803 (the ICCTA), abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board) effective January 1, 1996. Section 204 (b) (1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 15501. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute.

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I. INTRODUCTION

In these complaint proceedings, Ashley Creek Phosphate Company (Ashley Creek or complainant) alleges that Chevron Pipe Line Company, et al- and SF Phosphates Limited Company, et al- (collectively, defendants) acted unlawfully by establishing unreasonable and discriminatory rates and practices for the transportation of phosphate slurry through a pipeline between Vernal, UT, and Rock Springs, WY. This proceeding is before us on referral from the U.S. District Court for the District of Utah, Central Division, in Ashley Creek Phosphate Company v. Chevron U.S.A., Inc. No. 89-C-554-S (Referral order dated September 21, 1989).[2]

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[2] Ashley Creek initiated the court action, on June 19, 1989, by filing an antitrust complaint alleging the monopolization of the interstate transportation of phosphate rock concentrate from Vernal

II. BACKGROUND

Ashley Creek holds mineral leases to mine phosphate in Uintah County, UT. Ashley Creek has not yet developed its mineral rights or made any shipments. Defendants in the lead proceeding (collectively, Chevron)[3] constructed the pipeline in 1985-86, and began transporting phosphate slurry in May 1986. In November 1986, in response to Ashley Creek's request for rate information for phosphate pipeline movements, Chevron provided preliminary rate estimates but declined to publish a tariff.

On November 25, 1986, Ashley Creek filed a complaint with the ICC alleging that Chevron was a common carrier by pipeline unlawfully operating without a published tariff, in violation of 49 U.S.C. 10702, 10761, and 10762. In a decision in Docket No. 41031, served February 7, 1989,[4] the ICC determined that Chevron was

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to Rock Springs. The referral order is limited to the issue of whether the terms established by the defendants for transporting phosphate slurry from Vernal to Rock Springs are unjust, unreasonable or discriminatory.

[3] The five defendants are: (1) Chevron Pipe Line Company (CPL), which acquired the subject pipeline in April 1988; (2) Chevron Chemical Company (CCC), which operated a fertilizer plant at Rock Springs and shipped phosphate through the pipeline; (3) Chevron U.S.A., Inc. (CUSA), which owned and operated a phosphate mine and mill at Vernal and initially owned the pipeline; (4) Chevron Industries (CI), a division of which operated the Vernal facilities and performed certain pipeline operational functions; and (5) Chevron Corporation (Chevron), which is the parent company of CPL, CCC, CUSA, and CI.

[4] Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., 5 I.C.C.

a common carrier and ordered it to establish rates and file a tariff for the transportation of phosphate through the subject pipeline.

Chevron subsequently published a tariff, which was scheduled to take effect June 20, 1989. The day before the tariff became effective, Ashley Creek filed its antitrust suit against Chevron. The District Court referred the matter of whether the tariff was unjust, unreasonable or discriminatory to the ICC.[5] On December 21, 1989, Ashley Creek filed its complaint on referral [docketed as No. 40131 (Sub-No. 1)], alleging that the tariff rate was unreasonable in violation of 49 U.S.C. 10701.

In a decision served February 15, 1992, the ICC directed the parties to file evidence and argument on what methodology should be used to evaluate whether the tariff rates were unreasonably high. Ashley Creek suggested use of the ICC's "constrained market pricing" (SAC), which bases the maximum rate on the revenues needed to build and operate a competitive alternative to the incumbent.[6] Chevron urged the ICC to use "original cost ratemaking" (OCR), a method which bases the maximum rate on the amount needed by the carrier to recover its initial investment costs and operating costs,

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2d 303 (1989).

[5] CPL changed its rates on August 15, 1991, with publication of tariff CHVP No. 2, and again on February 4, 1992, with publication of tariff CHVP No. 3.

[6] Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) (Rate Guidelines), aff'd sub nom. Consolidated Rail Corp. v. U.S., 812 F.2d 1444 (3d Cir. 1987).

and earn a fair return. On March 30, 1992, the ICC issued a decision concluding that a "hybrid" ratemaking model, employing elements from both SAC and OCR, should be used for judging the challenged rates in this proceeding.

On April 17, 1992, Chevron sold its entire phosphate fertilizer project to SF Pipeline Limited Company (SFPL) and SF Phosphates Limited Company (SF Phosphates).[7] At the time of the pipeline purchase, SFPL adopted the Chevron tariff then in effect.[8] Accordingly, on June 1, 1992, Ashley Creek filed another complaint with the ICC (docketed as No. 40810) naming SFPL, SF Phosphates, Simplot, and Farmland as defendants and repeating the allegations contained in its original complaint.

In a decision served December 29, 1992, the ICC consolidated the two complaints (in dockets No. 40131 (Sub-No.1) and No. 40810) and indicated that it would apply the identical ratemaking methodology in each case. Thereafter, in a decision served February 24, 1993, the ICC set a procedural schedule for the submission of

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[7] SFPL and SF Phosphates were created as joint ventures of J.R. Simplot Company (Simplot) and Farmland Industries, Inc. (Farmland), to own and operate the phosphate slurry pipeline (SFPL) and the Vernal mine and Rock Springs fertilizer plant (SF Phosphates).

[8] Chevron had published a second tariff effective August 15, 1991, and a third tariff effective February 28, 1992. Each reduced the rates of the prior tariff. The rates in the second tariff were based on an estimated pipeline life of 14 years. On determining the estimate to be incorrect, Chevron published the third tariff to establish rates based on a 20-year-pipeline life. The first tariff also had used a 20-year life estimate for the pipeline.

evidence and arguments in both cases. The administrative record was completed on June 20, 1995.

III. PROCEDURAL MATTERS

Before turning to the merits of the complaints, we first dispose of various motions that are pending.

A. Defendants' Motion to Strike Rebuttal Material.

On June 22, 1995, defendants filed a motion for leave to late-file a motion to strike, along with a motion to strike portions of Ashley Creek's rebuttal evidence.[9] Defendants acknowledge that they previously had sought leave to file surrebuttal on the issue of the ability of Ashley Creek's president, John D. Archer, to obtain financing, but that, in its decision of April 21, 1995, the ICC denied the request. Defendants argue that, given the circumstances, a motion to strike is their sole avenue for bringing this matter to our attention.

Defendants' motion to strike is based on asserted conflicts between Witness Archer's statements and those contained in an August 1994 affidavit by David L. Brown, Senior Vice President of Key Bank of Utah. (Complainant had inadvertently attached Witness Brown's affidavit to its rebuttal.) Defendants contend that, as Archer's ability to obtain financing is relevant to several issues in this proceeding, and Brown's affidavit

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[9] Defendants move to strike paragraphs 10 and 48 of Witness Archer's rebuttal affidavit and other statements relying on those paragraphs at paged 5 and 10 of complainant's summary of its rebuttal and page 18 of the Travis/Bateson rebuttal statement.

calls the veracity of Archer's statements into serious doubt, we should grant their motion to strike.

In reply, Ashley Creek asserts that, if the tendered pleading is in fact a motion to strike, defendants have submitted it 9 months late without any justification for late filing.[10] Complainant argues, however, that the pleading is, in fact, simply impermissible surrebuttal argument regarding the issue of Archer's financial viability. Complainant responds to the argument and counters the assertions that Brown's affidavit contradicts Archer's statements.

We agree that defendants' motion is nothing more than a surrebuttal argument that the ICC specifically prohibited in its April 1995 decision. Defendants have ignored the ICC's admonishment to the parties to "file only those pleadings in the future that are permitted by Commission rules at 49 CFR Part 1104 or that are specifically requested by this agency." Decision of February 15, 1991, at 8. Accordingly, we deny the motion for leave to file.

B. Complainant's Motion to Strike Surrebuttal Material.

On July 5, 1995, Ashley Creek filed a motion to stroke portions of defendants' surrebuttal or, in the alternative, for leave to "enlarge the record." Complainant moves to strike specified portions of the surrebuttal concerning the use of July 20, 1989, as the starting date

[10] Under 49 CFR 1104.13, a motion to strike is due 20 days after the filing of the pleading it addresses. Thus, defendants' motion was due October 3, 1994.

for the computation of the 20-year period, and the reliance on market forecasts of Dr. Robert D. Willig.[11]

Ashley Creek asserts that the April 21, 1995, decision specifically precluded defendants from discussing the 1989 starting date in their surrebuttal. Complainant notes that defendants had the opportunity to discuss the issue in their reply statements. Ashley Creek also tenders reply arguments to the surrebuttal. The complainant requests that we consider these arguments if we deny its motion to strike.

Ashley Creek also argues that defendants improperly used their surrebuttal to reiterate points that Willig had already made in the defendants' reply. Here again, complainant requests that, should we not grant its motion, we consider its additional argument.

Additionally, Ashley Creek argues that it was improper for defendants to use Willig's views because they are based on a privately commissioned study to which complainant has been denied access. Complainant further argues that Willig's prediction that the demand for fertilizer would decline has been proven incorrect; instead, the fertilizer industry is in the midst of an economic boom.

In reply, defendants assert that complainant has misconstrued the April 21, 1995 decision. They argue that the ICC concluded that it would not be appropriate to

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[11] Complainant moves to strike page 1, line 20, to page 2, line 2, of the Introduction; page 2, line 8, to page 5, line 24, of the Argument; and page 5, line 1, to page 8, line 3, and page 9, line 7, to page 10, line 9, of the statement of John C. Klick.

submit surrebuttal addressing the tax implications of the proposed 1986 starting date, but that they were permitted to address Ashley Creek's new evidence comparing revenues and SAC. Because this evidence related to a period beginning in 1986, defendants assert, surrebuttal challenging the 1986 starting date was within the permitted limits.

The defendants maintain that they merely reiterated Willig's earlier statements but, in any event, reference to Willig's statement was necessary in order to address the Travis/Bateson statement submitted on rebuttal. Defendants characterize complainant's arguments as an attempt to file an additional reply to Willig's testimony.

We deny the motion to strike the arguments relating to the 1986 starting date. The April 1995 decision precludes discussion of the 1986 starting date only as relates to the attendant tax implications. Also, the Travis/Bateson material that defendants were permitted to address used a 1986 starting date.

We also deny the motion to strike references to Willig's forecasts. The forecasts are permissible to the extent they relate to the Travis/Bateson material. To the extent they are simple reiterations, complainant is not prejudiced by them. Ashley Creek's arguments that Willig's predictions have not been borne out go to the weight we give that evidence, not its admissibility.

IV. REASONABLENESS OF THE TARIFF TERMS

The district Court has referred the issue of whether the terms established by the defendants for transportation through the pipeline are unjust, unreasonable, or discriminatory. To assess the reasonableness of the charges, we employ a slightly modified version of the SAC analysis used to evaluate the reasonableness of rail rates. In addition to evaluation the tariff charges, we must also examine whether other provisions of the tariff are unlawful. It is to this issue that we turn first.

A. Non-Rate Matters.

Ashley Creek questions the reasonableness of various components of the tariffs' Rules and Regulations.

1. Definition of Phosphate Slurry.

Item No. 5 defines phosphate slurry as "phosphate concentrate of approximately 31% P_2O_5 concentration by weight." Complainant claims that the definition is inadequate and improper. It contends that phosphate slurry should be defined as merely "phosphate concentrate and water." It asserts that defendants' definition could prevent some economically useful shipments and, therefore, is unreasonable.

Defendants note that evidence presented by Ashley Creek shows that its phosphate would have a concentration of 31% and thus would not be affected by the definition in Item No. 5. Defendants further observe that the range of phosphate concentration in the Vernal area is very small - between 29% and 33% - and, thus, any phosphate from that area would meet the tariff definition.

We agree that complainant's own evidence shows that complainant's phosphate slurry meets the Item No. 5 definition.[12] We thus do not see any merit to its contention that the definition is too restrictive.

2. Conformance with required Specifications.

Item No. 10 indicates that phosphate slurry shall be accepted for transportation only when it "meets all required specifications" established by the pipeline operator. Ashley Creek complains that this item, which gives the operator the right to impose specifications, does not disclose the operator's specifications.

Defendants counter that Ashley Creek has presented proposed specifications for its phosphate slurry, and that these specifications meet those of defendants. Thus, defendants maintain that there is no dispute.

As complainant and defendants have exchanged specifications, and their specifications are in accord, we agree that there is no issue to be resolved.

3. Monthly Prorationing.

Item No. 65 requires shippers to make monthly predictions of the amounts to be shipped and provides for apportioning capacity between shippers in the event the total tenders by all shippers exceed the ability of the pipeline to carry all tendered phosphate. Ashley Creek

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[12] See Opening Statement of Facts and Argument of Complainant Ashley Creek Phosphate, Volume II, V.S. David E. Aro, Page 5, filed April 25, 1994.

asserts that this rule serves no legitimate purpose and could permit the competing shipper/pipeline operator to penalize the other shipper by restricting its capacity.

Defendants contend that this is an appropriate prorationing provision that applies only in periods in which shippers propose to tender greater volumes than the pipeline can transport due to capacity constraints. The resulting penalty - a reduction in a succeeding month for amounts of allocated throughput not used during a preceding month - is intended to deter shippers from over-predicting tenders and reserving more pipeline capacity than they will use.

The assailed prorationing provisions of Item No. 65 have not been shown to be unreasonable. Because more than one shipper can use the pipeline, a method for scheduling shipments and accommodating all users is necessary. The plan for prorationing monthly capacity of the pipeline when it is over-subscribed is not per se unreasonable. Moreover, the evidence of record shows that, even were Ashley Creek to ship its proposed 1.08 million tons a year in combination with defendants' historical and projected volumes, the prorationing and penalty provisions of the item never would be applied.

4. Ability to Determine Charges in Advance.

Finally, Ashley Creek complains that, as the tariff rates are based on the total monthly volume of all shipments moving through the pipeline, and volume is dependent on the shipments a second pipeline user tenders, the tariff prevents Ashley Creek from controlling

its transportation charges.[13] Complainant asserts that the lack of control makes it impossible for it to obtain financing for its mining project.

Defendants respond that the pipeline's shipment nomination procedure is, in fact, a means of providing rate certainty. They point out that, prior to making each month's shipments, a shipper is notified as to total nominations (proposed tenders) and is then able to ascertain the tariff rate it will pay. Defendants suggest that the only "risk" a shipper faces is that it will pay a lower rate than it would pay if it were the only shipper. Defendants assert that, in the months when a single shipper uses the pipeline, the shipper controls its rates as it controls the sizes of its own shipments.

Although the structure of the involved tariffs, under certain circumstances, can make it difficult for a shipper to determine its exact monthly charges, we do not believe that the procedures described by the parties here are unreasonable. The rate applicable to each volume range is readily apparent from the tariffs, and, prior to making

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[13] Ashley Creek suggests the use of a two-part tariff under which rates would be set by allocating the fixed cost of the pipeline based on each shipper's estimate of the pipeline capacity it requires–its "reserved pipeline capacity." Ashley Creek maintains that other pipelines use this method to distribute costs and that the Federal Energy Regulatory Commission sets new pipeline rates using reserved capacity and two-part tariffs.

The issue before this Board is the reasonableness of the terms of the defendants' existing tariff, not the relative efficiency of different tariff structures. Therefore, we will limit out review to the terms of the published tariffs.

each month's shipments, a shipper is notified as to the range in which total proposed monthly tenders fall. However, a shipper can determine its maximum charges in advance. A shipper cannot pay a higher rate than it had planned based on its own tonnage. The addition of another shipper's tonnage, if it is to have any effect on rates, can only lower applicable rates by pushing total tonnage into a higher throughput range. Thus, Ashley Creek would, in fact, have a significant degree of control over the rates it would pay.

B. Reasonableness of the Rates.

In its March 1992 decision, the ICC decided to use a hybrid ratemaking mode, based on its SAC constraint, for evaluating the reasonableness of defendants' tariff rates. Under SAC theory, we determine whether a hypothetical new transportation system could be designed and operated in a manner that would allow the new entrant to recover all its costs while being able to offer the shippers using the system lower rates than those offered by the incumbent. In the case of railroads, the exercise generally focuses on whether a new railroad, constructed today, could provide service at lower rates than the rates charged by the incumbent.

In this proceeding, the existing pipeline was constructed approximately one year prior to the filing of the complaint. This greatly simplifies the SAC analysis, by allowing use of the original construction and operating costs of the existing pipeline as a proxy for the costs that would face a hypothetical new entrant.[14] Thus, we will

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[14] Because the parties agree that the hypothetical stand-alone

examine whether the tariff rates would allow the SAPL to recover all of the costs it generates (including a reasonable rate of return on the actual construction costs over its life). If the tariff rates would allow the pipeline to earn greater revenues than needed to recover its costs, then under SAC theory, the tariff rates are unreasonably high.

For purposes of this calculation, the parties agree that the SAPL should be assumed to have a 20-year life. They differ, however, as to when the 20-year analysis should begin. Ashley Creek contends that the SAC analysis must coincide with the actual pipeline's useful life and reflect all costs of operating the pipeline from the date service commenced (which was in April 1986). Defendants contend that the SAC analysis should start from the point when Chevron first held out to provide common carrier service, by publishing a tariff (which was in mid-1989).

The ICC held that Chevron was under an obligation "to file a tariff when presented with a potential shipper with a demonstrable business or business planning need for the information." 5 I.C.C.2d at 310. Thus, we conclude that the appropriate starting point for the SAC analysis is when Ashley Creek demanded a tariff. It is at that point that Chevron was obligated to provide a

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pipeline (SAPL) would mirror the existing pipeline, we use the actual (original) cost of building the existing pipeline to value the investment in the SAPL. The use of original cost introduces an element of OCR into the analysis. However, other than using original cost to determine the cost of constructing the hypothetical pipeline, the "hybrid" rate reasonableness analysis we use is based on standard SAC procedures.

reasonable rate, and it is from that point that we need to hypothesize the existence of a competitor with a pipeline in place by which to measure the reasonableness of the Chevron rates. Complainant made the request for a tariff sometime in 1986. By filing a formal complaint with the ICC on November 25, 1986, Ashley Creek made clear that it was officially requesting a tariff rate. We will thus use the beginning of December 1986 as the date from which the stand-alone pipeline is assumed to have been in place.[15]

We now turn to an examination of the costs that would be incurred by a stand-alone pipeline capable of providing service to Ashley Creek and the defendant shippers. To evaluate the reasonableness of the tariff rates, those costs are then compared to the revenues that would be generated by the tariff rates over the same period.

1. Investment Costs.

The phosphate slurry pipeline is a 96-mile,10-inch diameter pipeline from Vernal to Rock Springs. The main components of the pipeline are the Vernal pump station, a booster pump station, the Rock Springs receiving station (RSRS), and the pipeline connecting the stations.

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[15] Use of December 1 rather than November 25 will have a negligible impact on our findings. We simply shift the analysis by six days to align the analysis at the start of the month and simplify our calculations.

The ICC's March 1992 decision directed that the original cost of the existing pipeline be used to value the investment base for the SAPL. The parties generally agree that the cost to plan and build the existing pipeline in 1986 was $34,997,770.[16] However, Ashley Creek would adjust that original cost to remove the cost of the RSRS ($1,591,902), as well as certain environmental, managerial, surveying and administrative costs that were incurred jointly for this pipeline and for another pipeline that Chevron built at the same time – the Raven's Ridge carbon dioxide (CO_2) pipeline (for which Ashley Creek would deduct $534,614). These adjustments if adopted, would reduce the investment base to $32,871,254. We decline to adopt either adjustment.

a. RSRS.

Ashley Creek's elimination of the costs of the RSRS facility is based upon recollections of consulting engineer David E. Aro. Aro claims that, during a tour of the pipeline, defendants stated that Ashley Creek would not be allowed to use the receiving station or any of its adjacent facilities. Instead, according to Aro, Ashley Creek would be required to install a valve in the pipeline to remove its slurry before the pipeline entered the receiving station. Consequently, Ashley Creek argues that it would not use the RSRS and should not pay for it. Thus, Ashley Creek removes the total cost of the RSRS ($1,591,902) from the investment base.

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[16] Bechtel Corporation completed a feasibility study in March 1984. Planning commenced in May 1984, and construction started in the summer of 1985. The first batch of slurry was shipped in May 1986.

Defendants maintain that the RSRS is an essential part of the pipeline used to deliver slurry to the shipper. Defendants state that the RSRS is part of the back pressure control facilities through which all phosphate slurry passes prior to exiting the pipeline. Defendants distinguish between the receiving station and shipper-owned facilities, such as storage tanks and settling ponds at the terminus of the pipeline, which are not part of the pipeline investment.

Ashley Creek has not shown that the pipeline could function without the RSRS. Ashley Creek's only evidence supporting the elimination of the costs, Aro's recollection of a discussion, is at odds with a quote used in the testimony of another of its witnesses.[17] The record indicates that the RSRS plays a part in the transmission of all slurry and, therefore, is an integral part of the pipeline. Thus, we include the RSRS construction costs in the SAPL's investment base.

b. Joint Construction Costs.

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[17] Opening verified statement of Elliot R. Travis, page 30. Witness Travis quotes the prepared direct testimony of defendants' witness Parham discussing how the operation of the pipeline would change if the throughput is increased:

> [T]he length of the water batch between slurry batches would be reduced as necessary up to a minimum of five minutes. Five minutes of water would place a 0.3 mile break between slurry batches, allowing the density meter at the Rock Springs terminal to sense the end of one batch and switch delivery points. (Emphasis added.)

The record reflects that certain construction costs were jointly incurred as Chevron simultaneously built the phosphate slurry pipeline and the Raven's Ridge CO_2 pipeline. These costs included environmental and surveying work, construction management and administration expenses, and right-of-way costs.

Defendants allocated these shared costs based on measured work content recorded during construction. Ashley Creek argues that these costs instead should have been allocated based on the ratio of each pipeline's construction costs to the combined cost for both pipelines. Based on those ratios, Ashley Creek states that the cost of building the CO_2 pipeline was 53.9% of the combined cost of the CO_2 and phosphate pipelines. Ashley Creek maintains that the phosphate pipeline's investment contains an over-allocation of the shared costs in the amount of $534,614.

We reject Ashley Creek's adjustment. Absent further evidence, the actual work content calculated at the time of construction would appear to provide the more precise basis for allocation.

2. Cost of Capital.

In its March 1992 decision (at 11), the ICC indicated that, absent better evidence, it would rely on Chevron's capital structure (debt/equity) and cost of capital to estimate the cost of capital for the SAPL. The parties present substantial evidence attempting to quantify the appropriate cost of capital for the SAPL.

a. Risk.

Ashley Creek relies on its estimate of Chevron's cost of equity to compute the cost of capital for the SAPL. Defendants, on the other hand, maintain that the construction and operation of a phosphate slurry pipeline is a risky venture and that investors would require a substantial risk premium before supplying capital for the SAPL. To account for this greater risk, defendants would add 200 basis points (or 2 percentage points) to Chevron's cost of debt and equity, and would increase the equity component of the SAPL's capital structure to 80% from Chevron's 70%.

Ashley Creek counters that the risk associated with a single-use project, such as a phosphate pipeline, would be shifted to the users of the project by using "take-or-pay" contracts.[18] Under this scenario, debt and equity investors would look to the creditworthiness of the shippers – defendants and Ashley Creek – rather than that of the SAPL.

Ashley Creek's theory is reasonable and unrebutted by the defendants. There is no question that a free-standing enterprise with heavy sunk costs in investment would involve substantial risk because those costs can be recovered only through use of the pipeline. Thus, to

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[18] Take-or-pay pipeline contracts are contractual commitments to use (take) a specified amount of capacity or, in the event the capacity is unused, pay the carrier for reserving that capacity. Ashley Creek's witness states that the lowest overall financing costs would be achieved using take-or-pay contacts. He also notes that Chevron's participation in this type of contract would shift the risk of the enterprise to Chevron.

decrease the cost of obtaining capital in the marketplace, an efficient new entrant would likely require the pipeline's users to enter into take-or-pay contracts prior to construction. The potential shippers' creditworthiness would then be assessed by the financial markets in determining the return required for capital investment.

While there is substantial evidence in the record concerning the creditworthiness of Chevron, there is none regarding the creditworthiness of Ashley Creek. We are thus left to assume that Chevron's creditworthiness is representative of the financial status of the shippers using the pipeline. This is a reasonable assumption to make in this case, and indeed one that the ICC announced that it would use in this case.[19] Because Chevron is a major shipper (and potentially the only shipper) in the SAC group, its cost of capital is indeed representative of what terms would be available in the financial markets for funds used to construct the SAPL.

b. Cost of Debt.

The parties agree to amortize the debt principal over the 20-year life of the pipeline. The parties also agree that Chevron has an Aa debt rating. Ashley Creek uses a 9.3% cost of debt based on the market value of Chevron's debt in May 1986. Defendants use a 9.8% cost of debt figure based on the market value of Chevron's debt in May 1989.

As discussed above, we base our analysis on the

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[19] See the ICC's corrected decision served March 30, 1992 at pages 11-12.

hypothetical SAPL starting up on December 1, 1986. Thus, we will use Ashley Creek's estimate of the cost of debt, because it better represents the cost of debt at the time the debt capital would have been raised to undertake the pipeline project.

c. Cost of Equity.

Both parties develop an estimate for the cost of equity based on the following formula:

$$k = \frac{D_1}{P_0} + g$$

where:

k = Cost of equity
D_1 = dividends in time period 1
P_0 = stock price in time period 0
g = expected long term growth in earnings per share

However, Ashley Creek's equity analysis is dynamic, looking at changes in the cost of equity for Chevron over the historic period (1986-1992), while defendants' analysis is static, based on 1989 data.

Ashley Creek computes Chevron's cost of equity for the period during which Chevron owned the pipeline. However, Ashley Creek was unable to do the same for SF Industries, for the period SF Industries owned the pipeline, because SF Industries is a privately held company for which no financial data are publicly available. Therefore, Ashley Creek applied the cost of equity of IMC Fertilizer, Inc. (IMC), as "the best and only

available proxy" for the last three quarters of 1992.

Ashley Creek estimated the growth in earnings using a weighted average of projected 5-year growth in cash flow (50%), projected 5-year growth in dividends (25%), and historical 10-year growth in dividends (25%). Ashley Creek's resulting estimate of the cost of equity for the period 1986-92 ranges from 10.91% to 13.31% for the historical dividend (D_1) data and 10.94% to 13.81% for the projected dividend data.

Ashley Creek suggests that, in some years, the spread between its calculated cost of equity and the 5-year Treasury bond yield is at the low end of the reasonable range and appears too volatile. To be conservative, Ashley Creek places a "spread floor" (lower limit) on the SAPL's annual cost of equity based on a 4.55 percentage point premium over the 5-year Treasury bond yields. Incorporating these two techniques to estimate the SAPL's equity cost, Ashley Creek develops annual estimates ranging from 11.29% to 13.79% for the period 1986 through 1992. It uses an average cost of equity of 12.75% for the period after 1992.

Defendants do not comment on complainant's estimation procedure, but rather calculate a single cost of equity for 1989 which they apply to the entire 20-year period. Defendants develop an expected dividend yield of 5.5% based on a dividend of \$2.85[20] and price of Chevron stock of \$52. Defendants start their growth analysis by looking at both 5- and 10-year historical

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[20] Defendants note that the 1989 edition of Value Line projected that Chevron would pay \$2.80 in dividends. Using this figure, they calculate an expected dividend yield of 5.38%.

growth rates for Chevron stock in earnings per share, dividends per share, net book value, and market price. They find that growth estimates range from negative 8.94% to a positive 7.6%. Defendants provide a second estimate of growth using an earnings retention model. This model yields an average implied growth in Chevron stock of 4.6%. Defendants' third (and preferred) approach to estimating growth is to survey investment advisory services and projections made by security analysis. These estimates range from 1% to 10.5% annual growth, depending on the basis of the projection (earnings, dividends, book value, or price).

Defendants discard all estimates of growth below 7% because those rates, when combined with Chevron's 5.5% expected dividend yield, suggest a cost of equity only 200 basis points above the May 1989 Aa yield on industrial bonds. Defendants assert that it is unrealistic to assume that investors in common stock would accept a return of less than 12%. They maintain that projected growth in market price and earnings provide the best guide as to growth[21] and judgmentally narrow their final estimate of growth to a range of 9% to 10%. When combined with their 5.5% expected dividend yield, this approach yields a cost of equity range of 14.5% to 15.5%.

To support this range, defendants perform a risk premium analysis.[22] Defendants note that the most

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[21] The Value Line estimates of earnings and price are 10.5% and 9.6%, respectively. The growth estimate in earnings from Institutional Brokers Estimate System (IBES) is 8%.

[22] A risk premium analysis estimates the cost of equity by adding to observable bond returns the additional return an equity holder

frequently cited study of risk premiums in the regulatory arena is Ibbotson and Sinquefield's Stocks, Bond, Bills and Inflation; Historical Returns (1926-1986), (SBBI). Based on an analysis of Chevron's risk in relation to the rest of the market and SBBI's risk premium range for the period 1926 through 1986, defendants arrive at a cost of equity of 15.13%. Defendants assert that the cost of equity derived from the formula and risk premium analysis agree, and their best estimate of an equity cost for Chevron is 15.25%.

Ashley Creek contends that defendants' analysis of Chevron's cost of capital is one-sided because it selectively eliminates from consideration all but the highest measures of growth. Ashley Creek also contends that defendants' risk premium analysis is defective.[23] It maintains that an appropriately applied analysis of risk premium using SBBI data yields a range from 1.99% to 4.07%, with the average being 3.17%. Ashley Creek avers that application of these risk premiums for the period 1986 through 1992 yields an equity cost ranging from 10.3% to 12.1%.

We agree with Ashley Creek's criticisms of defendants' cost of equity evidence. Defendants'

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would require to hold the stock instead of the bond. The difference between the two returns is known as the risk premium, which has been estimated in several academic studies to range between 5.5% and 8.3%.

[23] Ashley Creek criticizes (1) the method of calculating the risk premium itself; (2) the use of the average of an arithmetic and geometric mean; and (3) the use of SBBI data from 1926-1987 rather than a more relevant time period.

discounted cash flow (DCF) analysis (see n. 33, infra) of the cost of equity is biased in estimating the growth in Chevron's earnings.[24] It also improperly disregards relevant financial data as implausible simply because it produces a cost of equity only 200 basis points above corporate Aa bonds. Furthermore, defendants present a single point (1989) estimate of Chevron's cost of equity, a procedure we have rejected in other cases as less reliable than estimates based on multiple years of data.[25]

Because Ashley Creek's estimates span a longer time horizon and present a more accurate estimate of the return than would be expected by investors in the capital markets during the period, we accept Ashley Creek's estimates of the return equity investors in the SAPL would require for use of their capital.

d. Capital Structure.

The parties agree to hold the capital structure of the

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[24] Defendants' evidence shows that they reviewed data on earnings growth from IBES. (The Board uses IBES data to determine the cost of equity for rail carriers.) IBES estimated Chevron's earnings growth at 8%, but defendants chose to give no weight to any evidence which produced a cost of equity below 14.5%. Application of the IBES growth rate to defendants' expected dividend yield of 5.5% results in a cost of equity of 13.5%, which is close to Ashley Creek's estimate of 12.99% for the same year. Use of the 5.38% expected dividend yield from Value Line's estimate of dividends brings the two estimates even closer (i.e., 12.99% and 13.38%)

[25] See, e.g., West Texas Util. v. Burlington N.R.R., No. 41191, slip op. at 71, (STB served May 3, 1996).

SAPL static over the 20-year analysis period. Defendants assert that Chevron's capital structure in 1989 was 30% debt and 70% equity, but as noted earlier, defendants use a 20/80 capital structure mix to shift greater risk in the venture onto the equity investors. Ashley Creek computes Chevron's market value capital structure based on 1986 data, calculating a capital structure of 36% debt and 64% equity.

Ashley Creek's ratio more closely correlates to the time period the SAPL would have raised debt and equity capital to finance the pipeline. It is thus a better estimate of the capital structure which the SAPL would incur than Chevron's 1989 structure. Therefore, we will use Ashley Creek's estimated 36/64 debt/equity capital structure mix to calculate a cost of capital for the SAPL.

e. Interest During Construction.

The parties calculate interest during construction by applying the SAPL's cost of capital to the construction cost of the pipeline for one year. We use the same method to calculate interest during construction.

Ashley Creek's ratio more closely correlates to the time period the SAPL would have raised debt and equity capital to finance the pipeline. It is thus a better estimate of the capital structure which the SAPL would incur than Chevron's 1989 structure. Therefore, we will use Ashley Creek's estimated 36/64 debt/equity capital structure mix to calculate a cost of capital for the SAPL.

3. Operating Expense.

The parties separate operating expenses into two general categories, fixed and variable.[26] Because we are evaluating the reasonableness of tariff rates that vary with traffic volumes, we must account for changes in operating costs caused by changes in volume shipped.[27]

Ashley Creek notes that operating costs can vary significantly from year to year. In its presentation, Ashley Creek levelizes all components of operating expenses to smooth the fluctuation in historic annual operating expenses. After adjusting for inflation, levelization distributes operating expenses evenly over the life of the SAPL. Complainant asserts that this levelization encourages efficient management.

The ICC's March 1992 decision (at 11) permitted complainant to address the efficiency of the pipeline's operations. However, Ashley Creek has not shown how the pipeline could operate more efficiently and thus reduce expenses. Furthermore, its argument that

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[26] The parties agree that all of the operating expense accounts, other than accounts 310 (Materials - Supplies and Expenses) and 330 (Operations - Fuel and Power), are fixed and do not vary with pipeline output. The expenses associated with Accounts 310 and 330 do vary with volume. Account 310 accumulates the cost of the electricity required to operate the pipeline's pumping facilities. Account 330 accumulates the cost of supplies expended in the operation of the pipeline.

[27] The parties use the historic operating expense of the pipeline as starting point for their variable operating expense formulas. However, because historic operating costs reflect operations at only one level of production, the parties' formulas calculate variable expenses in order to reflect the costs of operating the pipeline at various proposed throughput levels.

levelization encourages efficient management is unsupported. The levelization of operating expense is simply a mathematical exercise to evenly distribute volatile annual operating costs (which Ashley Creek has not shown were incurred as the result of inefficient operation) over the 20-year period.

Because Ashley Creek has not shown that the annual fluctuations in CPL's actually-incurred operating expenses were the result of inefficient operation, we reject Ashley Creek's levelization procedure.

We discuss each category of operating expense below.

a. Fixed Costs.

The parties agree that the pipeline's historical fixed costs[28] reflect the costs that would have been incurred by the SAPL for the known period. As noted above, Ashley Creek develops a levelized annual cost for each component of operating cost for both the historic and forecast periods. Defendants use the historic costs for

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[28] Fixed operating expenses fall into several broad categories. They are: compensation for employees; payments to outside contractors for services; certain materials and supplies accounts (maintenance and general); and a general category that includes accounts for taxes, property insurance, and rentals.

Defendants only submitted operating expense evidence for the years 1989 forward. The only evidence on actual expenses pre-1989 was submitted by Ashley Creek. Thus, we use Ashley Creek's actual operating costs for 1986 and 1987. Ashley Creek asserts that it was not able to obtain actual 1988 costs from defendants. For 1988 operating costs, we use the average of 1987 and 1989 through 1993 costs.

that period, and the cost incurred by the pipeline in the first quarter of 1994 to develop an estimate of future costs.

Because we rejected Ashley Creek's levelization of operating cost, we accept defendants' use of historic fixed cost[29] and its estimate ($158,078 per month) for future time periods.

b. Fuel and Power.

The cost of electricity is a significant expense for the pipeline. Electricity powers the pumps used to move the slurry through the pipeline. Ashley Creek and defendants agree that historic electric expense can be used to estimate the electricity costs that the SAPL would incur to move various levels of throughput.[30]

Defendants disagree with Ashley's Creek's estimates

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[29] For certain years, the parties report slightly different historical operating expenses, e.g., for 1990 Ashley Creek's report $2,960,358 while defendants report $2,960,258. Because the differences between the parties is inconsequential and has no impact on the outcome of this proceeding, for administrative convenience we use the defendants evidence for historical operating expenses for the post-1988 period.

[30] Ashley Creek claims that electric expense is made up of a fixed and a variable portion. Ashley Creek's two-part tariff would divide any fixed electrical expense on the basis of each shipper's nominated capacity requirement. The variable portion would be assigned based on volume shipped. Because we are addressing the reasonableness of the defendants' rates and not Ashley's Creek's proposed two-part tariff, we need not address Ashley's Creek's division of electric expense into fixed and variable components.

of electric expense at higher volumes, maintaining that several errors have been made.[31] Defendants estimate a base electric expense predicated on the expense that would be incurred if only water were moved through the pipeline. Defendants' model contains an incremental cost to account for the additional cost of moving a ton of higher viscosity slurry rather than water.

In addition to the valid criticisms raised by defendants, Ashley Creek's method of estimating this operating expense allocates fixed electric expense based on its proposed two-part tariff. However, as noted above, we are not addressing Ashley Creek's two-part tariff structure. Furthermore, we have rejected complainant's levelization procedure and, thus, the distribution of cost it produces.

For these reasons, we accept defendants' method of estimating Fuel and Power expense. It appropriately permits the total electricity costs to rise to reflect increases in throughput. Defendants' 1994 costs

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[31] Defendants maintain that Ashley Creek relied only on the rate information for the Utah Power and Light Company but that electricity is also supplied to the pipeline by Pacific Power and Light. They claim that, to the extent the rates charged by the two utilities differ, Ashley Creek's analysis is invalid.

Defendants also assert that Ashley Creek uses only 1991 data to determine electric costs and, more significantly, calculates fixed costs based on the daily power requirement (kilowatts) to move 2.885 million tons annually but calculates the variable portion based on a throughput of 765,000 tons. Defendants content that Ashley Creek failed to consider the increased variable electricity costs due to the higher viscosity of slurry as opposed to water.

demonstrate this effect. They include a minimum $55,882 monthly charge for electricity, which is equivalent to a charge for pumping water. As the pipeline starts to ship phosphate, the cost of electricity increases incrementally by $0.075 for each ton of phosphate transported, the difference in electricity costs to pump slurry rather than water. At the pipeline's maximum monthly throughput, total electricity costs rise to approximately $73,000.

c. Maintenance - Supplied and Expenses

The parties agree that the costs of supplies needed to maintain the pipeline are directly variable with the level of throughput (a constant unit cost applied at all throughput). Ashley Creek estimates a levelized cost of $0.5602 per ton (1986 dollars).[32] Defendants use actual historical costs to determine a cost per ton for each year from June 1989 through 1994. Defendants' estimate of future cost ($0.3331 per ton) is based on 1st quarter 1994 cost.

As noted above, Ashley Creek's levelization of operating costs is unacceptable. Consequently, we will use defendants' method of estimating the costs of supplies at other volume levels.

4. Discounted Cash Flow Analysis

The revenue flow required to cover the total cost of

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[32] Actual supply and expense costs vary substantially – from $0.18 per ton in 1986 to $0.98 per ton in 1991, to $0.26 per ton in 1993.

the SAPL is calculated using a DCF analysis.[33] This model requires five basic inputs: (1) the investment in the pipeline; (2) a cost of capital; (3) the cost of operating the enterprise; (4) the impact of applicable Federal and state taxes on the earnings of the enterprise and (5) inflation rates in asset prices and other inputs necessary to operate the enterprise. The first three inputs are discussed above. The last two items, as well as a discussion of the parties' comments on the time pattern of recovery, are discussed below.[34]

d. Time Pattern of Recovery.

The parties disagree on when the capital costs of building the pipeline should be deemed to be recovered over the 20-year period of the SAPL. While capital costs are incurred entirely at the outset (in the construction phase) the recovery of those costs can be assigned in various ways. For example, they can be assigned at a constant rate in nominal terms (as with a level-dollar amortized mortgage), or at a constant rate in real terms (i.e. the nominal rate is adjusted for inflation in asset values), or using an OCR method (i.e. applying a nominal cost of capital to a depreciating investment base),

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[33] The term DCF is used here to describe both the discounting of monies to a single time period (its normal connotation) and the development of future expense levels and return on, and of, capital investment.

[34] As previously noted, Ashley Creek presents maximum rate evidence based on a DCF model that creates a two-part tariff. We will not address that portion of Ashley Creek's DCF model that deals with the allocation of the required revenue flow between Ashley Creek and the other shipper on the line.

resulting in a declining capital recovery pattern. The time pattern of recovery that we select for the SAPL analysis is important because it affects the assignment of the revenue requirement at different times in the life cycle of the SAPL. That, in turn, affects the ultimate calculation of the cumulative over-or under-recovery of the pipeline's SAC. This is because overpayments (or shortfalls) of revenues are determined on a monthly basis, by subtracting the required revenue flow (recovery of capital and operating cost) from the revenues derived from the tariffs. When the present value of the sum of these overpayments and shortfalls is positive, the rate structure permits recovery of excess revenues (which indicated that the rate structure is unreasonable). Thus, the assumptions used as to the expected time pattern of capital recovery can impact this so-called "netting" calculation.

In this case, Ashley Creek employs a constant capital recovery rate in real terms. In other terms, under Ashley Creek's approach, the recovery of capital investment would increase with inflation in the value of the assets over the 20-year analysis period. In contrast, defendants apply a declining capital recovery pattern, based on their projection of a declining market for the pipeline's service.[35] Defendants argue that capital cost recovery would thus need to be higher in the early years to make up for the pipeline's inability to charge as high a rate in

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[35] Defendants equate the market for phosphate fertilizer (the end product produced from the phosphate rock transported by the pipeline) with the market for the pipeline's service. Defendants presented evidence to show that the price for phosphate fertilizer declined at a 4% nominal rate, or an 8% real rate, from 1980 through 1993.

later years.

For purposes of our SAC analysis, it does not matter whether the market for the pipeline's services would decline over the period of the SAPL, increase over that time, or fluctuate. We assume a level rate per ton in real terms. See Bituminous Coal-Hiawatha, UT to Moapa, NV, 10 I.C.C.2d 259, 277 n.29. That is because, by design, a SAC analysis assumes that there are no barriers to entry or exit and that the market is thus contestable. Accordingly, if the revenues generated were higher than the revenues needed, a competitor would enter the market and undercut the SAPL. Alternatively, if the revenues generated were lower than the revenues needed, the SAPL would exit the market.[36] Therefore, for purposes of the SAC analysis, the SAPL rates must be set to exactly match the revenue needs of the SAPL (i.e., the SAC costs).

In a contestable market, the defendants' declining capital recovery pattern would not be sustainable because the higher rates it would permit in the early years would encourage entry by a competing service offering lower rates (in the absence of barriers to entry and exit). This prospect would drive the rates down to the level that

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[36] Contestable market theory would allow instantaneous exit and reentry. However, our SAC constraint does not assume such intermediate exit and reentry activity for the SAC carrier. Rather, it judges the financial decision to enter the market by the final outcome at the end of the forecasted SAC period (in this case, 20 years). The purpose of this hypothetical exercise is to determine if the SAC carrier could provide the service over the course of the forecasted SAC period at rates below those charged by the defendants.

could not be undercut by another carrier - a level rate in real terms. The resulting constant recovery in real terms is the pattern of capital cost recovery that is normally established in competitive markets and is appropriate for use in a contestable market.

b. Impact of Tax Liability on Capital Payments

The Federal and state taxes that would be incurred as a result of doing business are included in the SAC analysis. Tax liabilities are taken into account by incorporating in the DCF model the applicable Federal and state tax rates, permissible depreciation schedules, investment tax credits and the reduction in Federal tax liability for state taxes paid. Both parties have presented evidence on these matters, and the parties' different starting points for the analysis (1986 or 1989) have a significant impact on the taxes the SAPL will face.

i. Investment Tax Credit. As discussed earlier defendants assume that the SAPL was placed in service in 1989 and that, accordingly, tax laws during that period would govern the pipeline's tax liability. Ashley Creek maintains that the pipeline began to provide service in 1986 and that the tax code applicable to that time period should be used to determine the SAPL's tax liability.[37]

Because we start the SAC service period from the date

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[37] Tax laws were changed with the passage of the 1986 Tax Reform Act. However, Ashley Creek argues that, just as Chevron did, the SAPL would have signed a written contract prior to December 31, 1985, for construction of the pipeline, thus permitting it to qualify under transition provisions available in the 1986 act.

the initial complaint was filed, we apply as the applicable tax laws those that would have been available to the SAPL in December 1986. We agree that, by signing a contract for construction prior to the end of 1985, the SAPL would have been able to take advantage of the transition rules in the tax code, just as Chevron presumable did when it constructed its pipeline. These transition rules permit certain pipeline assets to qualify for a 10% investment tax credit. Furthermore, because the hypothetical pipeline would have been placed into service prior to January 1, 1987, its assets would have qualified for depreciation under the Accelerated Cost Recovery System. Under this depreciation method, the pipeline assets would have been depreciated for tax purposes over a 5-year period.

ii. Tax Shelter Flow-through to Parent Corporation.

Ashley Creek acknowledges that the tax benefits arising from investment in the SAPL should not be permitted to flow to a parent corporation.[38] Nevertheless, in its presentation, it argues that the SAPL would pass the tax benefits onto a corporate parent because it believes that CPL did so.[39] However, our SAC procedures do not permit the passage of tax benefits onto a corporate parent.[40] The SAC test, a test of rate reasonableness,

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38 See Rebuttal of Complainant Ashley Creek Phosphate Company, Volume II, R.V.S. of Elliot R. Travis and Steven R. Bateson, at 12.

39 Ashley Creek asserts that it cannot prove that CPL shared its tax benefits with Chevron because it has been refused discovery on this issue.

40 See Bituminous Coal–Hiawatha, UT. to Moapa, NV, 6 I.C.C.2d

measures the cost of an efficient competitor, not that of an efficient competitor and its corporate parent combined. Thus, our DCF model does not assume that the SAPL would pass tax benefits onto a corporate parent, although it does permit the SAPL to pass on available tax savings to its shippers in the form of lower rates.

iii. Federal and State Tax Rates. Defendants object to other tax aspects of Ashley Creek's presentation as well. Ashley Creek's presentation assumes that the SAPL would pay state tax on all earnings. Defendants note that half of the pipeline's earned income would be generated in Wyoming, where there are no state income taxes.

Defendants also argue that complainant's state tax calculation leads to a double count of income tax credits in the pipeline's early years. Finally, defendants maintain that Ashley Creek used the wrong Federal statutory tax rate for 1987.

Our restated DCF model reflects that Wyoming has

1, 74 (1989):

> The purpose of the SAC test is to determine the costs which an efficient competitor would face if it entered the transportation industry and competed with the incumbent for a defined group of traffic. The resultant costs and estimated maximum rates should reflect only the economic costs of the hypothetical (stand-alone railroad) and should not be influenced by an assumed parent corporation. Recognizing the financial condition of the parent corporation in the calculation of SAC would incorrectly change the test to one which measures the relative merits of different corporate owners.

no state income tax. Further, we ensure that there is no double count of income tax credits, and use a Federal statutory tax rate for 1987 of 40% in recognition of the different rates applicable during that year.

c. Inflation in Asset Prices and Operating Costs.

Ashley Creek estimates inflation in the value of the pipeline assets based on a weighted average of the initial cost of each asset. Defendants present no evidence on the inflation in asset prices.[41] Defendants agree to use Ashley Creek's weighted indices for estimating inflation in operating costs.

We accept the parties' use of a common inflation index for operating expenses. We use Ashley Creek's estimate of inflation in pipeline assets, as it is the only evidence on future inflation in asset prices.

d. Disposal of Unconsumed Assets (Salvage).

Ashley Creek's presentation includes a calculation of both the costs that would be expended and those that would be recouped by closing the pipeline at the end of its (20-year) life. In its analysis, Ashley Creek accepts defendants' proposal to set aside funds to defray the cost of closing the pipeline. It agrees that this is a legitimate business cost, and calculates the present value of that cash flow and adds it to the total investment that must be recovered over 20 years. Inclusion of these monies in the

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[41] Defendants assume that the market for phosphate and phosphate fertilizer declines by 8% annually. They use this assumption in their DCF model to determine the time pattern of recovery of capital costs, rather than inflation in asset prices.

investment base would permit accumulation of sufficient funds to pay the cost of abandoning the pipeline in the year 2006.

Complainant also asserts that a substantial number of the assets have service lives greater than 20 years and would have a salvageable value at the end of the pipeline's life. These assets fall into four general categories; land; communications equipment; buildings; and other station equipment, including controls, piping, and electrical equipment. Ashley Creek calculates a residual value for these assets by computing the future value of each asset at the end of 20 years, depreciating that value using the asset's service life and straight line depreciation, and taxing the remaining value at the end of 20 years using an estimate of the appropriate state and Federal tax rates. Ashley Creek's resulting adjustment to the SAPL investment base in shown in the following table.

Ashley Creek Adjustments to Start-up Investment

Start-up Investment	$32,871,254
Interest During Construction	$2,800.631
Subsequent Additions	$0
Unconsumed Assets at End of Recovery Period	($473,741)
Abandonment Costs	$394,317
Total	$35,592,461

The parties do not address the linkage between the abandonment costs and salvage value of any unconsumed assets. We assume that monies set aside for abandonment of the pipeline permit the salvage of any saleable assets. Because it is reasonably to assume that unconsumed assets will have some value and defendants do not discuss abandonment cost or support their zero salvage value, we accept Ashley Creek's treatment of abandonment cost and salvage of unconsumed assets. We note that the net affect of assuming some value from salvaged assets and abandonment cost is minimal and results in only a small offset to the capital investment to be recovered through the rates charged.

5. Revenues.

Having determined the costs of constructing and operating the SAPL, we now consider the revenues that would be available to the SAPL under the defendants' rate structure.

a. Tariff Rates.

The defendants' tariffs assess a specified rate for shipping a certain monthly volume. The following tables show the monthly revenues that would be produced by moving various volumes under the tariffs.

Tariff I.C.C. CHVP No. 1
Effective 6-20-89 to 8-14-91

Monthly Volume (tons of concentrate)			Monthly Revenue	
From	To	Rate	From	To
0	42,000	$21.60	$0	$907,200
42,001	62,500	15.60	655,216	975,000
62,501	84,000	11.70	731,262	983,800
84,001	104,000	9.75	819,010	1,014,000
104,001	125,000	8.45	878,808	1,056,250
125,001	160,000	7.50	937,508	1,200,000
160,001	241,677	7.00	1,120,000	1,691,667

Tariff I.C.C. CHVP No. 2
Effective 8-15-91 to 2-27-92

Monthly Volume (tons of concentrate)			Monthly Revenue	
From	To	Rate	From	To
0	42,000	$21.00	$0	$882,000
42,001	62,500	14.95	627,915	934,375
62,501	84,000	11.10	693,761	932,400
84,001	104,000	9.15	768,609	951,600
104,001	125,000	7.85	816,408	981,250
125,001	160,000	6.80	850,007	1,088,000
160,001	200,000	5.35	856,005	1,070,000
200,001	234,000	4.70	940,005	1,099,800

[42] The CPL tariff was adopted by SFPL November 4, 1992, as tariff I.C.C. SFIP No. 1.

Tariff I.C.C. CHVP No. 3
Effective 2-28-92 to present[42]

Monthly Volume (tons of concentrate)			Monthly Revenue	
From	To	Rate	From	To
0	42,000	$19.75	$0	$829,500
42,001	62,500	14.00	588,014	875,000
62,501	84,000	10.15	634,385	852,600
84,001	104,000	8.30	697,208	863,200
104,001	125,000	7.00	728,007	875,000
125,001	160,000	5.95	743,756	952,000
160,001	200,000	4.60	736,005	920,000
200,001	234,000	4.00	800,004	936,000

The potential revenues that the pipeline could generate from June 20, 1989, until the end of the 20-year analysis period can be developed by multiplying the various monthly volumes by the rate established for each level of throughput. The parties present five different estimates of the monthly volumes the SAP would move during its life.[43] We find it necessary to test only

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[43] Ashley Creek presents two and defendants present three different volume scenarios. Ashley Creek's primary volume scenario assumes that each shipper will use its entire reserved capacity (1.085 million tons for Ashley Creek, and 1.8 million tons for defendants). Its alternative volume scenario assumes only that defendants will ship 1.8 million tons of throughput--the volume Chevron originally desired to transport on an annual basis.

defendants' two primary volume scenarios. We do not need to test defendants' third volume scenario or Ashley Creek's scenarios, which assume constant monthly volumes of 173,750, 150,000, and 240,000 tons. Our analyses using static monthly volume in the appropriate rate/volume range yield the same results we would have reached as if we had applied these scenarios.

5. Pre-June 20, 1989 Rates.

Because our SAC analysis begins before the tariff was actually published, we must also determine what revenue contribution to attribute to the SAPL for the pre-tariff period from December 1, 1986, to June 19, 1989. Ashley Creek asserts that the pipeline's actual revenues, which are reflected in corporate transfers between the shipper and its pipeline sibling, should be used to determine the total revenue flow for the pre-June 20, 1989 period.[44] However, we do not believe the corporate bookkeeping transactions between the Chevron shipper and the pipeline are germane to the question of the

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Defendants, on the other hand, use the actual volumes transported for the historic period and an average of those volumes for the forecast period. They present an alternative scenario that adds Ashley Creek's reserved capacity of 1.085 million tons to the actual volumes shipped over the historic period and the projected volumes for the forecast period. Their third scenario assumes that defendants' ship 1 million tons annually while Ashley Creek ships 1.085 million tons annually.

[44] Complainant asserts that the pipeline was paid $22.57 per ton of throughput from the inception of service in April 1986 through the end of 1987. It further asserts that from the beginning of 1988 until the effective date of the initial tariff, the pipeline's records indicate that it earned a rate of $18.32 per ton.

reasonableness of the tariff rates – the question that the referring court has asked us to address. Those revenue transfers were established to maximize the profit level of the combined corporate entities. They were not necessarily representative of the rates which would have been charged to an independent (unaffiliated) shipper. Rather, we believe that the rates contained in the first tariff are the best measure of the rates which would have been charged prior to June 20, 1989, because CPL set those rates based on the possibility that a non-affiliated shipper might request service. Therefore, in evaluating the reasonableness of the tariffs, we will assume that the somewhat lower rates published on June 20, 1989 would have been applicable if the tariff had been filed in 1986.

6. Results of Our Rate Reasonableness Analysis.

The final step in our analysis is to compare the revenue needs of the hypothetical SAPL to the revenues that would be generated by the challenged tariff rates. A monthly comparison is necessary because the tariff rates are dependent on total monthly volumes.[45] Our analysis thus compares the costs and revenues on a monthly basis to determine the overpayments or shortfalls in revenues. By summing the present value (in December 1986 dollars) of all monthly overpayments and shortfalls over the 20-year SAPL period, reasonableness can be determined. If a cumulative overpayment exists, the

[45] The monthly volumes shipped by CPL varied substantially from 1986 through 1993. The minimum monthly volume shipped during that period was 16,383 while the maximum shipped was 92,298. Thus, only the first four rate/volume ranges in the tariffs have actually been used.

tariff rates are unreasonable to the extent that they result in greater recovery than needed based on the SAPL costs.

Potentially, there are an almost infinite number of combinations of monthly volume levels that could flow through the pipeline. It would not be practical to attempt to analyze all of the possible volume combinations. Therefore, we have evaluated the reasonableness of each rate/volume category by determining the constant monthly volume at which the revenues produced from the tariff rates would just equal the full SAC costs of the SAPL. See Appendix Tables 1-8. By so doing, we are able to conclude at what point revenues would exceed costs within each volume range, and thus when the rate charged under the tariff would be reasonable.

In the range of 0 to 42,000 tons shipped per month, the defendants' rate would become unreasonable when phosphate shipments reach a constant monthly level of 34,112 tons. In the 42,001 to 62,500 ton range, the rate would become unreasonable when constant monthly shipments exceed 48,315 tons. For the 62,501 to 84,000 ton range, constant monthly shipments above 66,580 tons would cause the defendants' rate to become unreasonable. In all constant volume ranges above 84,000 tons, the defendants' rate levels would be unreasonable.

This analysis of the defendants' tariff rates indicates that the rates are unreasonable for shipments at many volume levels. However, there may be certain shipping patterns where the tariff rate structure would be reasonable. We cannot know what the actual volume levels will be in the future, or what they would have been in the past if Ashley Creek had been using the pipeline.

However, in evaluating the reasonableness of the tariff rates we have constructed two possible scenarios.

One reflects the amount the defendants have shipped and expect to ship through the pipeline over its 20-year-life. In other words, it assumes that the total amount of phosphate to be shipped is determined by the actual demand for phosphate in the market and, thus, would be the same amount whether shipped by defendants, Ashley Creek, or some combination of the two. Under this assumption, we determine that the net present value of the revenues exceeds costs by approximately $1.7 million. See Appendix Table 9.

The second scenario, which we find intuitively less compelling, assumes that the potential demand for phosphate exceeds the quantities actually shipped; it utilizes the sum of the full traffic projections of both the defendants and Ashley Creek beginning in 1986.[46] With the inclusion of both the defendants' and Ashley Creek's tonnages, the tariff rates would generate excess revenues of over $21 million. See Appendix Table 10.

On the record developed in this proceeding, we are unable to determine the size of the phosphate market, nor can we evaluate whether Ashley Creek has the ability to

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[46] Defendants argue that the market for phosphate is limited, and that any phosphate moved by Ashley Creek would displace phosphate shipments by defendants. Indeed, one would expect that if the market could have accommodated the additional shipments that Ashley Creek contends it could move, the defendants would have exploited that demand, at least prior to the time Ashley Creek was in a position top mine and ship phosphate.

serve that market.[47] Rather, it is for the court in the underlying antitrust action to determine whether Ashley Creek was ever in a position to market phosphate, or will be in the future, and to determine the size of the potential; market for phosphate that could be delivered by this pipeline. It may be that the court will conclude that one of our other volume usage scenarios – or, indeed, a scenario that we did not even consider at all – is more useful for purposes of the antitrust litigation. Our role is simply to assist the court by presenting a framework for addressing the narrow issue that is subject to our primary jurisdiction.

We find:

Defendants' subject tariffs covering the transportation of phosphate slurry from Vernal, UT, to Rock Springs, WY, are unreasonable to the extent discussed in this decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Defendants' motion for leave to file a motion to strike, filed June 22, 1995, is denied.

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[47] Defendants allege that Ashley Creek has never received a permit from the State of Utah to mine phosphate and, that it is questionable whether it will ever even be in a position to move any traffic.

2. Ashley Creek's motion to strike, filed July 5, 1995, is denied.

3. This proceeding is discontinued.

4. A copy of this decision will be mailed to:

The Honorable David Sam
United States District Court for the
District of Utah, Central Division
150 U.S. Courthouse
350 South Main Street
Salt Lake City, UT 84101

Re: Case No. 89-C-554-S

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

Appendix

Table 1

RATE REASONABLENESS ANALYSIS
Tariff Rate Levels for 0 - 42,000 Tons Per Month
(Based on Breakeven Volume of 34,112 Tons)

Year	Total Cost ($000)	Total Revenue ($000)	Net Overpayment or Shortfall ($000)	Present Value Overpayment or Shortfall ($000)	Cumulative Present Value Overpayment or Shortfall ($000)
1986	455	737	282	279	279
1987	7,193	8,842	1,649	1,542	1,821
1988	7,501	8,842	1,341	1,126	2,948
1989	7,356	8,842	1,486	1,118	4,066
1990	7,841	8,842	1,000	669	4,735
1991	8,480	8,749	269	161	4,896
1992	8,299	8,167	(132)	(67)	4,829
1993	8,193	8,085	(109)	(50)	4,779
1994	8,379	8,085	(294)	(122)	4,657
1995	8,651	8,085	(566)	(209)	4,448
1996	8,929	8,085	(844)	(278)	4,170
1997	9,216	8,085	(1,131)	(332)	3,838
1998	9,513	8,085	(1,428)	(374)	3,465
1999	9,820	8,085	(1,735)	(405)	3,060
2000	10,137	8,085	(2,053)	(426)	2,633
2001	10,465	8,085	(2,381)	(441)	2,193
2002	10,804	8,085	(2,719)	(449)	1,744
2003	11,154	8,085	(3,070)	(451)	1,293
2004	11,516	8,085	(3,432)	(449)	844
2005	11,891	8,085	(3,806)	(444)	399
2006	12,235	7,411	(3,824)	(399)	0

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Table 2

RATE REASONABLENESS ANALYSIS
Tariff Rate Levels for 42,000 - 62,500 Tons Per Month
(Based on Breakeven Volume of 48,315 Tons)

Year	Total Cost ($000)	Total Revenue ($000)	Net Overpayment or Shortfall ($000)	Present Value Overpayment or Shortfall ($000)	Cumulative Present Value Overpayment or Shortfall ($000)
1986	460	754	294	291	291
1987	7,333	9,044	1,712	1,601	1,892
1988	7,627	9,044	1,418	1,191	3,083
1989	7,506	9,044	1,538	1,157	4,240
1990	7,993	9,044	1,051	703	4,943
1991	8,658	8,902	244	147	5,090
1992	8,417	8,205	(211)	(108)	4,982
1993	8,253	8,117	(136)	(63)	4,919
1994	8,448	8,117	(331)	(137)	4,782
1995	8,722	8,117	(605)	(224)	4,559
1996	9,002	8,117	(885)	(292)	4,267
1997	9,292	8,117	(1,175)	(345)	3,922
1998	9,591	8,117	(1,474)	(386)	3,536
1999	9,900	8,117	(1,784)	(416)	3,120
2000	10,220	8,117	(2,103)	(437)	2,683
2001	10,551	8,117	(2,434)	(451)	2,233
2002	10,892	8,117	(2,775)	(458)	1,775
2003	11,245	8,117	(3,128)	(460)	1,315
2004	11,610	8,117	(3,493)	(457)	858
2005	11,987	8,117	(3,870)	(452)	406
2006	11,326	7,440	(3,885)	(406)	0

000298

Table 3

RATE REASONABLENESS ANALYSIS
Tariff Rate Levels for 62,501 - 84,000 Tons Per Month
(Based on Breakeven Volume of 66,580 Tons)

Year	Total Cost ($000)	Total Revenue ($000)	Net Overpayment or Shortfall ($000)	Present Value Overpayment or Shortfall ($000)	Cumulative Present Value Overpayment or Shortfall ($000)
1986	466	779	313	310	310
1987	7,513	9,348	1,835	1,716	2,026
1988	7,789	9,348	1,559	1,309	3,335
1989	7,700	9,348	1,648	1,240	4,575
1990	8,188	9,348	1,160	775	5,350
1991	8,886	9,166	280	169	5,519
1992	8,569	8,232	(337)	(173)	5,347
1993	8,331	8,109	(221)	(103)	5,244
1994	8,538	8,109	(428)	(177)	5,067
1995	8,814	8,109	(705)	(260)	4,806
1996	9,097	8,109	(988)	(325)	4,481
1997	9,390	8,109	(1,280)	(376)	4,105
1998	9,692	8,109	(1,582)	(414)	3,691
1999	10,004	8,109	(1,895)	(442)	3,249
2000	10,327	8,109	(2,218)	(461)	2,788
2001	10,661	8,109	(2,551)	(472)	2,316
2002	11,006	8,109	(2,896)	(478)	1,838
2003	11,362	8,109	(3,253)	(478)	1,360
2004	11,730	8,109	(3,621)	(474)	886
2005	12,111	8,109	(4,002)	(467)	419
2006	11,443	7,434	(4,009)	(419)	0

000299

Appendix

Table 4

RATE REASONABLENESS ANALYSIS
Tariff Rate Levels for 84,001 - 104,000 Tons Per Month
(Based on Volume of 84,001 Tons) */

Year	Total Cost ($000)	Total Revenue ($000)	Net Overpayment or Shortfall ($000)	Present Value Overpayment or Shortfall ($000)	Cumulative Present Value Overpayment or Shortfall ($000)
1986	472	819	347	344	344
1987	7,685	9,828	2,144	2,005	2,348
1988	7,943	9,828	1,885	1,583	3,931
1989	7,885	9,828	1,943	1,462	5,393
1990	8,374	9,828	1,454	971	6,364
1991	9,104	9,599	495	297	6,661
1992	8,713	8,504	(209)	(106)	6,555
1993	8,404	8,366	(38)	(17)	6,538
1994	8,623	8,366	(256)	(106)	6,432
1995	8,902	8,366	(536)	(198)	6,235
1996	9,188	8,366	(821)	(270)	5,964
1997	9,483	8,366	(1,116)	(328)	5,637
1998	9,788	8,366	(1,421)	(372)	5,265
1999	10,103	8,366	(1,737)	(405)	4,860
2000	10,429	8,366	(2,062)	(429)	4,431
2001	10,766	8,366	(2,399)	(444)	3,987
2002	11,114	8,366	(2,747)	(453)	3,534
2003	11,474	8,366	(3,107)	(457)	3,077
2004	11,845	8,366	(3,479)	(456)	2,622
2005	12,230	8,366	(3,863)	(451)	2,171
2006	11,555	7,669	(3,886)	(406)	1,765

*/ Volumes above this level would increase the overpayment condition for the SAPL.

000300

Appendix

Table 5

RATE REASONABLENESS ANALYSIS
Rate Levels for 104,001 - 125,000 Tons Per Month
(Based on Volume of 104,001 Tons) */

Year	Total Cost ($000)	Total Revenue ($000)	Net Overpayment or Shortfall ($000)	Present Value Overpayment or Shortfall ($000)	Cumulative Present Value Overpayment or Shortfall ($000)
1986	479	879	400	396	396
1987	7,882	10,546	2,664	2,491	2,887
1988	8,121	10,546	2,425	2,036	4,923
1989	8,097	10,546	2,449	1,842	6,765
1990	8,588	10,546	1,958	1,308	8,072
1991	9,355	7,813	(1,542)	(834)	7,239
1992	8,880	8,090	(789)	(430)	6,808
1993	8,489	8,736	247	116	6,924
1994	8,721	8,736	15	7	6,931
1995	9,003	8,736	(267)	(98)	6,833
1996	9,291	8,736	(555)	(183)	6,650
1997	9,590	8,736	(854)	(250)	6,400
1998	9,898	8,736	(1,162)	(304)	6,096
1999	10,217	8,736	(1,480)	(345)	5,751
2000	10,546	8,736	(1,810)	(376)	5,375
2001	10,886	8,736	(2,150)	(398)	4,977
2002	11,238	8,736	(2,502)	(413)	4,564
2003	11,601	8,736	(2,865)	(421)	4,143
2004	11,977	8,736	(3,241)	(424)	3,719
2005	12,366	8,736	(3,630)	(423)	3,295
2006	11,683	8,008	(3,675)	(384)	2,911

*/ Volumes above this level would increase the overpayment condition for the SAPL.

000301

Appendix

Table 6

RATE REASONABLENESS ANALYSIS
Rate Levels for 125,001 - 160,000 Tons Per Month
(Based on Volume of 125,001 Tons) */

Year	Total Cost ($000)	Total Revenue ($000)	Net Overpayment or Shortfall ($000)	Present Value Overpayment or Shortfall ($000)	Cumulative Present Value Overpayment or Shortfall ($000)
1986	486	938	452	447	447
1987	8,089	11,250	3,161	2,956	3,403
1988	8,307	11,250	2,943	2,470	5,874
1989	8,320	11,250	2,930	2,204	8,077
1990	8,812	11,250	2,438	1,628	9,705
1991	9,617	8,302	(1,315)	(695)	9,010
1992	9,054	8,280	(774)	(422)	8,588
1993	8,578	8,925	347	163	8,751
1994	8,824	8,925	101	43	8,794
1995	9,109	8,925	(184)	(67)	8,726
1996	9,400	8,925	(475)	(156)	8,570
1997	9,702	8,925	(777)	(228)	8,342
1998	10,014	8,925	(1,089)	(285)	8,057
1999	10,336	8,925	(1,411)	(329)	7,728
2000	10,669	8,925	(1,744)	(362)	7,366
2001	11,013	8,925	(2,088)	(386)	6,980
2002	11,368	8,925	(2,443)	(403)	6,577
2003	11,736	8,925	(2,811)	(413)	6,164
2004	12,116	8,925	(3,191)	(418)	5,746
2005	12,508	8,925	(3,583)	(418)	5,328
2006	11,818	8,181	(3,637)	(380)	4,948

*/ Volumes above this level would increase the overpayment condition for the SAPL.

000302

Table 7

RATE REASONABLENESS ANALYSIS
Rate Levels for 160,001 - 200,000 Tons Per Month
(Based on Volume of 160,001 Tons) */

Year	Total Cost ($000)	Total Revenue ($000)	Net Overpayment or Shortfall ($000)	Present Value Overpayment or Shortfall ($000)	Cumulative Present Value Overpayment or Shortfall ($000)
1986	498	1,120	622	616	616
1987	8,434	13,440	5,007	4,681	5,297
1988	8,617	13,440	4,823	4,047	9,345
1989	8,691	13,440	4,749	3,570	12,915
1990	9,186	13,440	4,254	2,840	15,755
1991	10,055	9,671	(384)	(128)	15,626
1992	9,345	8,208	(1,137)	(612)	15,014
1993	8,726	8,832	106	50	15,064
1994	8,995	8,832	(163)	(67)	14,998
1995	9,285	8,832	(453)	(167)	14,830
1996	9,582	8,832	(750)	(247)	14,583
1997	9,889	8,832	(1,057)	(310)	14,273
1998	10,206	8,832	(1,374)	(360)	13,913
1999	10,534	8,832	(1,702)	(397)	13,516
2000	10,873	8,832	(2,041)	(424)	13,092
2001	11,224	8,832	(2,392)	(443)	12,650
2002	11,586	8,832	(2,754)	(454)	12,195
2003	11,960	8,832	(3,128)	(460)	11,736
2004	12,347	8,832	(3,514)	(460)	11,275
2005	12,746	8,832	(3,914)	(457)	10,819
2006	12,043	8,096	(3,947)	(412)	10,406

*/ Volumes above this level would increase the overpayment condition for the SAPL.

000303

Table 8

RATE REASONABLENESS ANALYSIS
Rate Levels for 200,001 - 234,000 Tons Per Month
(Based on Volume of 200,001 Tons) */

Year	Total Cost ($000)	Total Revenue ($000)	Net Overpayment or Shortfall ($000)	Present Value Overpayment or Shortfall ($000)	Cumulative Present Value Overpayment or Shortfall ($000)
1986	511	1,400	889	880	880
1987	8,828	16,800	7,972	7,454	8,334
1988	8,972	16,800	7,828	6,568	14,902
1989	9,115	16,800	7,685	5,776	20,678
1990	9,613	16,800	7,187	4,797	25,476
1991	10,556	14,708	4,152	2,492	27,967
1992	9,678	9,870	193	108	28,075
1993	8,895	9,600	705	329	28,405
1994	9,191	9,600	409	171	28,576
1995	9,487	9,600	113	43	28,618
1996	9,790	9,600	(190)	(62)	28,556
1997	10,103	9,600	(503)	(147)	28,409
1998	10,427	9,600	(827)	(216)	28,193
1999	10,761	9,600	(1,161)	(271)	27,922
2000	11,107	9,600	(1,507)	(313)	27,609
2001	11,465	9,600	(1,865)	(345)	27,264
2002	11,834	9,600	(2,234)	(368)	26,895
2003	12,216	9,600	(2,616)	(384)	26,511
2004	12,610	9,600	(3,010)	(394)	26,117
2005	13,018	9,600	(3,418)	(399)	25,718
2006	12,300	8,800	(3,500)	(366)	25,353

*/ Volumes above this leval would increase the overpayment condition for the SAPL.

000304

Table 9

Rate Reasonableness Analysis
for
Defendants' Traffic Alone

Year	Total Cost ($000)	Total Revenue ($000)	Net Overpayment or Shortfall ($000)	Present Value Overpayment or Shortfall ($000)	Cumulative Present Value Overpayment or Shortfall ($000)
1986	278	769	490	486	486
1987	6,952	9,024	2,072	1,951	2,437
1988	7,861	9,909	2,048	1,717	4,154
1989	7,158	9,636	2,478	1,869	6,023
1990	8,135	9,306	1,171	780	6,803
1991	8,704	9,244	540	322	7,125
1992	8,899	9,090	191	105	7,230
1993	9,139	8,984	(155)	(75)	7,155
1994	8,969	8,571	(398)	(163)	6,992
1995	9,021	8,261	(760)	(281)	6,711
1996	9,311	8,261	(1,050)	(346)	6,365
1997	9,611	8,261	(1,350)	(396)	5,969
1998	9,920	8,261	(1,659)	(434)	5,535
1999	10,240	8,261	(1,979)	(462)	5,073
2000	10,571	8,261	(2,310)	(480)	4,593
2001	10,913	8,261	(2,652)	(491)	4,102
2002	11,266	8,261	(3,005)	(496)	3,606
2003	11,631	8,261	(3,370)	(495)	3,111
2004	12,009	8,261	(3,748)	(491)	2,620
2005	12,399	8,261	(4,138)	(483)	2,137
2006	11,715	7,573	(4,142)	(433)	1,704

000305

Table 10

Rate Reasonableness Analysis
for the
Full Traffic Projection of
Defendants' and Ashley Creek

Year	Total Cost ($000)	Total Revenue ($000)	Net Overpayment or Shortfall ($000)	Present Value Overpayment or Shortfall ($000)	Cumulative Present Value Overpayment or Shortfall ($000)
1986	412	945	533	528	528
1987	8,124	13,447	5,323	4,972	5,500
1988	8,621	13,823	5,202	4,364	9,864
1989	8,388	13,494	5,106	3,839	13,703
1990	9,122	13,752	4,630	3,095	16,798
1991	9,921	12,511	2,591	1,554	18,352
1992	9,472	10,069	597	326	18,678
1993	9,073	9,697	624	296	18,974
1994	9,172	10,798	1,626	666	19,639
1995	9,361	11,298	1,938	719	20,358
1996	9,660	11,298	1,638	541	20,900
1997	9,970	11,298	1,329	391	21,291
1998	10,290	11,298	1,008	265	21,556
1999	10,621	11,298	678	159	21,714
2000	10,963	11,298	336	70	21,785
2001	11,316	11,298	(17)	(3)	21,782
2002	11,681	11,298	(383)	(63)	21,719
2003	12,058	11,298	(760)	(111)	21,608
2004	12,449	11,298	(1,150)	(150)	21,457
2005	12,852	11,298	(1,553)	(181)	21,276
2006	12,143	10,357	(1,786)	(186)	21,090

000306